SUPREME COURT, U.S.

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No. 08-___

IN THE

Supreme Court of the United States

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., JOSEPH BERNSTEIN, DENNIS VACCO, AND PAUL DEBARY,
Petitioners,

v.

HARRAH'S OPERATING COMPANY, INC., AND PARK PLACE ENTERTAINMENT CORPORATION
Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether "Indian lands" must presently be held in trust by the United States for the application of the Indian Gaming Regulatory Act of 1988.

II. Whether Congress intended to prohibit Indian tribes from entering into precursory agreements to seek regulatory approval under the Indian Gaming Regulatory Act of 1988.

PARTIES TO THE PROCEEDINGS

A number of Petitioners are listed in the caption, because they were appellants in the Court of Appeals. The real parties-in-interest are Petitioner Catskill Litigation Trust and Respondent Harrah's Operating Company, Inc., successor by merger to Respondent Park Place Entertainment Corporation.

The Catskill Litigation Trust is represented by its trustees: Dennis C. Vacco, formerly Attorney General of the State of New York, and Joseph E. Bernstein. The trustees are pursuing the claims of the Trust on behalf of approximately 15,000 unit holders, including approximately 13,000 members of the St. Regis Mohawk Tribe, whose interests are represented by the St. Regis Mohawk Tribal Council as the governing authority of the Tribe. The Tribal Council controls 50% of the Trust ownership units as Custodian for tribal members.

Litigation claims against Respondent Park Place Entertainment Corporation were initiated in November 2000 by Petitioners Catskill Development, LLC, Monticello Raceway Development, LLC, and Mohawk Management, LLC, in the United States District Court for the Southern District of New York. The claims were transferred in January 2004 to Petitioner Catskill Litigation Trust, a Delaware trust registered with the Securities and Exchange Commission, in connection with a corporate reorganization of these entities with Empire Resorts, Inc., a public company.

RULE 29.6 STATEMENT

No publicly held company owns 10% or more of the ownership units of the trust. Empire Resorts, Inc., a public company, has contractual rights to a priority distribution of $10 million as a recovery of prior litigation costs.

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HARRAH'S OPERATING COMPANY, INC., AND PARK PLACE ENTERTAINMENT CORPORATION
Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Catskill Development, LLC v. Park Place Entertainment Corp.*, 547 F.3d 115 (2d Cir. 2008).

OPINIONS BELOW

The decision of the United States Court of Appeals *was issued on* October 21, 2008, in *Catskill Development, LLC, v. Park Place Entertainment Corporation,*

547 F.3d 115 (2d Cir. 2008). Summary Judgment in favor of Respondent was granted by the District Court in *DeBary v. Harrah's Operating Company, Inc.*, 465 F. Supp. 2d 250 (S.D.N.Y. 2006). Earlier opinions in the litigation include: *Catskill Development, LLC v. Park Place Entertainment Corporation,* at 144 F. Supp. 2d 215 (S.D.N.Y. 2001), 154 F. Supp. 2d 696 (S.D.N.Y. 2001), 217 F. Supp. 2d 423 (S.D.N.Y. 2002), 169 Fed. Appx. 658 (2d Cir. 2006), 206 F.R.D. 78 (S.D.N.Y. 2002), 204 F. Supp. 2d 647 (S.D.N.Y. 2002), 286 F. Supp. 2d 309 (S.D.N.Y. 2003), and 345 F. Supp. 2d 360 (S.D.N.Y. 2004).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on diversity, 28 U.S.C. § 1332.

WHY THE WRIT SHOULD BE GRANTED

A. Conflict between the Circuits - Petition No. 08-655

Respondent filed a Petition in *Harrah's Operating Company, Inc. v. NGV Gaming, Ltd.*, No. 08-655, for review of *Guidiville Band of Pomo Indians v. NGV Gaming, LTD.*, 531 F.3d 767 (9th Cir. 2008) (***"Guidiville"***) (App. C, at 197a), on the basis of a conflict with the case that is the subject of this Petition. (**"Catskill"**, App. A, at 1a)

The Petitions involve claims by unrelated parties *against Respondent* for tortious interference with agreements relating to gaming ventures in New York and California. The controversy involves enforceability of agreements with Indian tribes for the purpose

of maintaining state tort claims for intentional interference with contractual relations against Respondent. The outcome depends on whether the term "Indian lands" under §81 (Contracts and Agreements with Indian Tribes) and §2703(4)(B) of The Indian Gaming Regulatory Act of 1988 ("**IGRA**") requires that title to land be held in trust by the United States for the benefit of a tribe, in order to invoke federal jurisdiction over the agreements and apply the contract voiding provisions under the two statutory regimes; or, in the absence of trust lands, whether title may be brought to the United States "*back from the future*" under the Dictionary Act, 1 U.S.C. §1. Where applicable, the Dictionary Act includes the future tense whenever the present tense is used in a federal statute (unless the context requires a different interpretation), such that definitions that include as "Indian lands" land that "**is**" held by the United States in trust may be interpreted to include land that "***will be***" so held.

In June, 2008, the Ninth Circuit held *in Guidiville* that the Dictionary Act does not apply to expand the definition of "Indian lands" under §81. In October, 2008, the Second Circuit rejected *Guidiville*. The Court held that the Dictionary Act applied to expand the "Indian lands" definition under §2703(4)(B) of IGRA, after holding that "Indian lands" are in any case not required for a contract to be void under Reg. §533.7. This regulation provides that unapproved management contracts are void.

The Second Circuit should have followed *Guidiville*. A trust relationship between the United States and a tribe constitutes a jurisdictional nexus under IGRA for the Chairman of NIGC ("**Chairman**") to be authorized to approve management contracts relating to

trust lands. The Chairman received his authority to approve management contracts under IGRA pursuant to §2711(h), when the pre-existing authority of the Secretary of the Interior ("**Secretary**") to approve management contracts under §81 was transferred to the Chairman upon enactment of IGRA. The trust relationship remains a jurisdictional foundation with respect to the residual authority of the Secretary to approve agreements under §81. As IGRA voiding regulation, Reg. §533.7, was founded under and continues to be based on the purpose underlying the original enactment of §81, to protect tribes from unscrupulous elements who would take advantage of them, the statutes should have been construed in a similar manner.

We respectfully ask the Court to grant our Petition and to consider consolidation with Petition No. 08-655. Respondent is before the Court on a similar question of law in both cases and has asked the conflict to be resolved by the Court. We agree. A consistent ruling is appropriate under these circumstances. Otherwise, Respondent will be whipsawed, winning one case and losing another *on the same legal issue*, and one aggrieved party that filed similar claims against Respondent will win while the other will lose under the same principle of law. In addition, there are a number of negative impacts generated by the decision of the Second Circuit that warrant a reversal.

B. Negative Impacts of Catskill

Catskill's expanded definition of "Indian lands", incorporating *hypothetical* trust lands under the Dictionary Act, is an anomaly. It would include as "Indian lands" land that may never be held in trust as a basis for creating *current* jurisdiction in NIGC

under IGRA (and DOI under §81) to approve agreements with tribes. The decision invites extrapolation to other definitions, such as whether a tribe seeking recognition is an "Indian tribe" under §2703(5),[1] or whether non-reservation lands should be treated as an "Indian reservation". §2703(4)(B). None of these 'futuristic' interpretations were contemplated by Congress when it enacted *specific and unambiguous* definitions of "Indian lands" under §§81 and 2703(4)(B).

The Writ should be granted for the following reasons:

1. The conflict creates uncertainty as to the status of tribal agreements nationwide, *for gaming and other purposes*. Tribes need to be able to provide assurances to promoters, developers, and managers, who typically pay the tribe's expenses, that their commitments to seek regulatory approval are valid in order to secure land positions and initial funding for placing land into trust and approval of related agreements.

2. *Catskill* violates our nation's policy to promote *tribal self determination*. Tribes will find predevelopment financing opportunities unavailable or expensive to obtain, hampering economic opportunities.

3. *Catskill* contradicts the legislative history, statutes, court decisions, and policy of the United States Department of Interior ("**DOI**") and NIGC, all of which require an existing government-to-government

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[1] See, e.g., *First American Casino Corp v. Eastern Pequot Nation*, 175 F. Supp. 2d 205 (D. Conn. 2000)("Indian tribe" must be 'recognized' under IGRA definition)

relationship between the United States and a tribe in order to activate the trust responsibility of the United States.

4. *Catskill* increases the breadth of review that NIGC and DOI must now entertain, to include agreements relating to non-Indian lands, without a legislative mandate.

5. *Catskill* will generate unintended consequences. If Indian lands are deemed to exist when title is actually held by non-Indians, or in fee simple by a tribe, existing mortgages, leases and other agreements may become unenforceable as a result of the Dictionary Act.

6. *Catskill* is inconsistent with guidance specific to the instant case by NIGC, that it would not be appropriate for the Chairman to approve the management contract before the land was held in trust.

7. *Catskill* also raises the question of whether Congress intended to *prohibit* a tribe from entering into a precursory agreement under which the tribe would agree to seek approval of a management contract. Forbidding tribes from entering into such agreements, or, in the alternative, requiring that they seek approval for precursory agreements, is the *antithesis* of self determination.

For the foregoing reasons, and discussion below, we urge the Court to grant this Petition.

STATEMENT

A. Introduction

In the past decade of the vast expansion of Indian gaming, Respondents Harrah's Operating Company, Inc. (**"Harrah's"**) and Park Place Entertainment

Corporation ("**Park Place**"), the largest casino companies in the world, became prolific interlopers in Indian Country. (Park Place merged into Harrah's in 2005. Harrah's and Park Place are collectively referred to as "Respondent".)

In seeking to share in the growth of Indian gaming, Respondent developed a strategy to become involved in ventures that had already entered the regulatory approval stage, often substituting itself in place of a competitor as the developer or operator. At the same time, Respondent devised a legal defense strategy to insulate itself from liability for breaking up contractual relationships of competitors with tribes.

Respondent's interference arises during the approval stage. Incentives are given to induce a tribal council to terminate existing agreements with project partners and start a relationship with Respondent. An indemnity against future claims relating to the execution of a new agreement with Respondent is included to ease the concern of the tribal council. A lawsuit follows.

In the ensuing litigation, Respondent invokes as a shield against contract interference claims statutory protections intended by Congress to insulate tribes from unscrupulous elements that would take advantage of them (such as Respondent). Although *not within the "zone of interests" intended to be protected by federal Indian law*, Respondent argues that its competitors' agreements are unenforceable under voiding statutes relating to agreements with tribes, §81(b) and IGRA, barring a claim for interference with contractual relations under state law for want of an enforceable agreement.

This is exactly what happened in the instant case.[2] Respondent was able to use laws Congress intended to protect tribes to take advantage of an Indian nation that would have been Respondent's major competitor. Respondent robbed the tribe of a unique economic opportunity, sanctioned under federal law and by the State of New York that would have sustained 13,000 tribe members for the indefinite future.

B. Derailment of a Tribal Economic Development Opportunity

This case involves the courtship of a tribe planning to develop a casino in the Catskills, 90 miles from Manhattan, by a competitor that operated casinos in Atlantic City. It involves a scheme crafted by a casino magnate in the summer of 1999 to derail a project that had the potential of becoming his company's biggest competitor within a few years. The tribe is the St. Regis Mohawk Tribe ("**Tribe**"). The executive is Arthur Goldberg, then Chairman and CEO of Park Place.

Over a period of six months, Goldberg succeeded in befriending the Chiefs, ostensibly to assist with their on-reservation casino and to develop a second Mohawk casino in the Catskills. Ultimately, as the Chiefs had trouble meeting payroll at the existing casino, Goldberg was able to demand an *exclusive agreement for the entire State of New York*. In exchange, Goldberg provided $3 million. All along, Goldberg had only one objective.

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[2] Murphy, Sean, "Casino Politics – Casino case raises issue of money, politics." Boston Globe, Oct. 30, 2001, at A-1 (App. D, at 246a).

Unbeknownst to the Chiefs, Goldberg secretly engaged Ivan Kaufman and Gary Melius (the Tribe's casino manager and building contractor), as his agents to secure a casino venture with the Tribe in the Monticello area. To induce Kaufman to do his bidding, Goldberg promised Kaufman an interest in the new project. Goldberg promised Melius $10,000,000 for the same effort.[3] But it was Kaufman who would eventually "squeeze" the Chiefs by intentionally withholding payroll, causing the Chiefs to run to Goldberg as their "Savior".[4]

In audio tapes withheld by Park Place and Kaufman during discovery, Kaufman reminds Clive Cummis, General Counsel of Park Place, that he should "remember" the pressure Kaufman was exerting:

> KAUFMAN: ... *But you got to remember the pressure on them with how we're squeezing them in Akwesasne is huge. I mean they—you know, I have kind of delayed their payrolls and—*
>
> CUMMIS: Yeah.
>
> KAUFMAN:—*slowed it down so badly that, you know, they're looking at Arthur as the savior* [i.e., Arthur Goldberg].
>
> CUMMIS: Yep, they are.

---

[3] *See, Declaration of Senator Alfonse D'Amato*, August 13, 2000 App. K, at 316a.

[4] Cummis was simultaneously misinforming the Chiefs that the Governor said that he would concur only if Park Place participated in the Project, a claim refuted by the Governor's Adviser on Indian gaming and Counsel. *See, Affidavits of John F. O'Mara and Patrick L. Kehoe*, May 23, 2002 (App. S, at 380a; App. T, at383a). Cummis also misrepresented that a new project would be approved within four months.

KAUFMAN: And it is great. I mean I never would have thought that you would have gotten where you have gotten, but I guess Arthur is a genius.

CUMMIS: He's pretty good. I'm not bad. He's pretty good.

KAUFMAN: You must be a hell of a team.

CUMMIS: Yeah.

KAUFMAN: I mean I have been around a little bit, but not as much as you guys. But to take a situation like this--*remember we started with our letter of intent and they said never would they give an exclusive.*

CUMMIS: Yeah.

KAUFMAN: But you guys can maneuver. I'm impressed.

CUMMIS: *They've given it to us now.* Now, we had better get together about the financial situation.

* * *

Catskill, App. A, at 25a-36a (Emphasis supplied.)

Goldberg thus succeeded in inducing the Chiefs to abandon development of the Tribe's $500,000,000 project (the **"Project"**).

The derailment occurred one week after the most important federal approval – the "two-part" determination, was issued by the Secretary. Ironically, there was *no contractual prohibition* restricting the Tribe from opening any number of gaming facilities in the Catskills. But Goldberg was not interested. He wanted this one stopped.

The Project was to be located on a 29-acre site within the 230-acre Monticello Raceway. The Tribe had been working on the two-part determination for four years with its local partners (**"Catskill Group"**), who had funded over $10 million for the Tribe to achieve its objectives. It was a significant achievement. Since IGRA was enacted in 1988, only *two* such determinations had been issued by the Secretary.

The Project was a joint initiative of five governments: The Tribe, State of New York, Sullivan County, Town of Thompson, and Village of Monticello. It was a *mega development* that would have revitalized the Catskills and sustained the Mohawk people for the indefinite future. State and local governments would have received hundreds of millions of dollars a year.

This was going to be a "class III" casino. As New York's Constitution provided charitable organizations the right to operate "Las Vegas nights", the Tribe would be entitled to operate a wide variety of games that would compete with Park Place. By Goldberg's own account, Park Place stood to lose 15% of its Atlantic City revenues, i.e., *hundreds of millions of dollars each year*, if a casino were to open one hour closer to the New York Metro Area. Park Place controlled 30% of the Atlantic City market, with the Caesars Palace, Bally's, Grand and Hilton casinos, and 40% of its customers were from the New York area.

In order to develop a gaming facility on non-reservation land, the Tribe had to comply with §2719(b), the "two-part" determination, under which the Secretary must determine that (1) the Project is in the best interest of the Tribe, and (2) not detrimental to the surrounding community. After the Gov-

ernor concurs, title is transferred to the United States, in accordance with DOI regulations. 25 C.F.R. Part 151.

On April 6, 2000, the Secretary issued the determination and asked the Governor to concur. This would be the last significant hurdle for the Project. (App. F, at 259a) The Governor was ready to concur. (App. J, at 314a; App. S, at 380a; App. T, at 383a)

Goldberg was concerned. *Before the Governor could act*, he flew to the Reservation to induce the Chiefs to grant Park Place an *exclusive* right to manage the Tribe's casinos **for the entire state of New York**, effectively killing the Project. Goldberg provided $3 million and an indemnity. He knew the Chiefs' "Achilles heel" was an upcoming tribal election and that the Chiefs had to meet payroll.

The "Exclusivity Agreement" was signed on April 14. The indemnity section described the shield Park Place would use in this action (App. G, 299a):

> "Both parties understand that there exists between the Tribe and Mohawk Management, LLC a purported Gaming Facility Management Agreement signed on July 31, 1996. Both the Tribe and [Park Place] believe such agreement is unenforceable and of no force and effect for, among other reasons, (1) it is subject to the approval of the NIGC, which approval has not been granted...[Park Place] also understands the Tribe's legal position with respect to the unenforceable agreement and agrees that it will indemnify the Tribe against any litigation resulting from the Tribe entering into this Agreement with [Park Place] in substitution with the Tribe's prior understanding with the developers of a

proposed casino at the Monticello Race Track." App. G, at 301a.

The New York Times broke the story on April 22.[5] In the week that followed, Goldberg attempted to extract the Raceway at a distress price. Having severed the Tribe from the Project, Goldberg knew he had blocked the Catskill Group's ability to move forward. Goldberg prematurely informed a leading gaming analyst that he would be acquiring the Raceway. [6]

On May 1, the Governor informed the Secretary that he would suspend action pending clarification of the situation. (App. F, at 297a; App. S, at 380a; App. T, at 383a)

C. Status of Regulatory Review as of April 14, 2000

Around the time of the breach, the parties were deeply involved with the Bureau of Indian Affairs ("**BIA**") and NIGC. On March 10, the BIA provided comments to the Tribe's application to transfer the land into trust and the Tribe responded on March 14. (App. AA, at 479a) By March 22, 2000, the parties had incorporated the comments in a Master Amendment. The revisions were coordinated with NIGC and led to issuance of the two-part determination.

The Master Amendment dealt with a *proposed* development and construction agreement ("Gaming

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[5] See, Bagli, Charles, "*Mohawks Sign New Casino Deal, Leaving Castkill Plan in Limbo*", New York Times, April 22, 2000 (App. E, at 254a), and "*Deal Signed for Casino at Old Catskills Resort*", New York Times, May 2, 2000 (App. BB, at 492a).

[6] Bear Stearns & Co. Inc., *Equity Research Report on Park Place Entertainment Corporation,* April 25, 2000. (App. CC, at 495a).

Facility Development and Construction Agreement," or "**DCA**"), a *proposed* management contract for the gaming operations ("Gaming Facility Management Agreement", or "**MA**"), and ancillary agreements that would be implemented with the closing and financing of the real estate transaction ("Shared Facilities Agreement"; "Leasehold Mortgage Agreement")[7] under a Land Purchase Agreement. ("**LPA**") (App. Q, at 335a) BIA did seek to approve or request an amendment to the LPA, the contract under which the Tribe would acquire the 29-acre Project site. The LPA was a binding agreement for the Tribe to acquire the land (App. Q, at 346a, §§5.03 and 6.03) once the approvals had been obtained, with the Tribe having the right to specific performance. (App. Q, at 357(a), §12.02) The Tribe's main obligation was to submit the LPA to the BIA, not for its approval,[8] but so that the BIA would approve the trust conveyance and all related agreements necessary to effectuate the transfer. (App. Q, at 350a, §§ 8.01 and 8.02)

The parties also reached an advanced stage at NIGC. By letter of April 19, NIGC decided that the DCA and MA, taken together, constituted a management contract. There was no reference to the LPA. NIGC comments were limited to the DCA and MA. (App. N, at 321a; App. O. at 323a) The LPA, as a contract to sell land governed by state law, was not

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[7] These two agreements were not before the Court of Appeals.

[8] The LPA and DCA did have the standard "Section 81 Compliance Certificate" attached, which was the practice with all submissions. See, note 21, *infra*. As of April 14, after amendment of §81, the statute no longer applied to the DCA. It never applied to the LPA, as it was the agreement under which Indian lands were to be established to begin with.

subject to approval under either §81 or IGRA. *Cf.*, §2711(g)("No management contract ...shall transfer, or in any other manner, convey, any interest in land or other real property, unless specific statutory authority exists...").

As described by NIGC General Counsel Kevin Washburn by letter dated April 11, 2002 (App U, at 385a), at the time the Tribe abandoned the Project, NIGC staff had not completed its review and *no final determinations had been made regarding the "management contract":*

> "As you are aware, no decision was made on the management contract at issue. The Chairman, who makes such decisions, was never asked to make a decision in this case because the management contract review process was not completed. Indeed, discussion in any forum on the question of whether or not the contract might or might not have been approved would involve only raw speculation...It is not unusual for management contracts to have deficiencies, especially when first submitted. Indeed, Commission staff is unaware of any contract in recent memory in which a management contract was sufficient upon submission. The review of a management contract is an iterative process in which the staff identifies deficiencies and requests submissions of additional information or material from the parties. It is only when the staff reaches the point that all available information has been received (or the parties have refused to make additional submissions) and the parties have addressed all of the issues identified by the staff (or have refused to address such issues) that a contract is submitted to the Chairman for his

action. *The absence of action by the Chairman on the contract at issue in this case is a clear indicator that the staff had not completed its work." Id.,* at 387a (Emphasis supplied.) [9]

ARGUMENT I

WHETHER "INDIAN LANDS" MUST PRESENTLY BE HELD IN TRUST BY THE UNITED STATES FOR THE APPLICATION OF THE INDIAN GAMING REGULATORY ACT OF 1988

A. Regulatory Framework

IGRA was enacted to balance competing interests of the federal and state governments and tribes, by giving each a role in the regulatory scheme.[10] It provides for various classes of gaming, the most lucrative being class III, the "most heavily regulated and most controversial form of gambling". [11] Class III gaming is lawful only if: (1) the governing body of the tribe having jurisdiction over the "Indian land" on

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[9] The letter contradicts the statement in *Catskill* that, "NIGC had denied Catskill Group's application several times." It clarifies there had been no final determination as to a *purported* excessive land price or hidden management fees. While NIGC asked questions, as it should, it made no *final* determinations. The Court made the findings *for the first time on appeal*. There was no final agency action that could have been challenged under §2714 (Judicial Review). NIGC was still waiting for a response to its April 19 comments as of May 24, 2000 (App. W), and closed the file on June 12, after learning the Tribe had abandoned the Project. (App. X, at 426a)

[10] *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815, 125 S. Ct. 51, 160 L. Ed. 2d 20 (2004).

[11] *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003).

which gaming is to take place authorizes class III gaming by adopting an "ordinance" or resolution that is then approved by the Chairman; (2) the gaming is located in a state that permits such gaming; and (3) the gaming is conducted in conformance with a "tribal-state compact" that regulates such gaming. *Id.* §2710(d)(1).

B. "Indian Lands"

The consistent and overarching requirement common to each class of gaming activity is that it be sited on land within the tribe's jurisdiction and over which the tribe "exercises governmental power." §2710(a)(1), (b)(1),(d)(1)(A)(i) and (d)(2)(A).

For purposes of IGRA, "Indian lands" include—

> (A) all lands within the limit of any Indian reservation; and
>
> (B) *any lands title to which is either held in trust by the United States for the benefit of any Indian tribe* or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe *exercises governmental power*. *Id.* §2703(4) (Emphasis supplied).

C. "Indian lands" In the Ninth Circuit

Respondent's *modus operandi* of seeking protection under an Indian statutory shield served it well until *Guidiville*. The decision involved interference claims against Respondent with respect to agreements entered into by NGV Gaming, Ltd. ("**NGV**") with the Guidiville Band of Pomo Indians. The agreements were subject to approval under §81. In June 2008, the Court appropriately held that §81 does not invalidate an agreement otherwise subject to approval under

the statute, where no present trust relationship exists between the United States and the tribe. As title to land was not so held, §81 did not apply to void the agreements. *Guidiville* did not address the issue as it relates to IGRA. Respondent's focus was the Dictionary Act.

§81(a)(1) defines "Indian lands" as—

> "... lands the title to which ***is*** held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation." (Emphasis supplied)

Under § 81(b)—

> "No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary."

The Court concluded that the word "is" means just that (*in the most basic, present-tense sense of the word*) and that §81 applies only to contracts that affect land already held in trust. The Court addressed the concern of the dissent that §81 would be subject to abuse by having agreements executed just before the land is placed in trust. The majority concluded that this was not a serious concern given the protections under procedures for taking land into trust 15 C.F.R. Part 151. This is correct because, as once the land is in trust, unapproved contracts are void. §81(b); Reg. §533.7.

D. "Indian lands" in the Second Circuit

Guidiville manifests a thorough command of a complex area of Indian law by the Ninth Circuit, but the three-judge panel in *Catskill* was not persuaded. The Court did not have the benefit of a District Court opinion as the term "Indian lands" was interpreted on appeal for the first time. Since the proceedings began in 2000, this argument had been repeatedly ignored by the District Court, *without explanation.*

The Second Circuit ruled that Indian lands are not required for the IGRA contract approval statutes or voiding regulations to apply, §§2710(d)(9), 2711, Reg. §533.7, because these subsections, in contrast to others, did not use the term "Indian lands". The Court failed to undertake a legal analysis regarding the intent of Congress, the position of NIGC as to the role of Indian lands under IGRA, or the embodiment of the term "Indian lands" within the definition of other terms in the relevant statutes, e.g., "class III gaming activity" and "management contract", that only bear relevance in relation to activities on "'Indian lands". The Court did not understand that "Indian lands" are a jurisdictional requirement for application of IGRA. [12] Indeed, approval by NIGC of a

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[12] The *Catskill* panel failed to comprehend an important argument that state law would fill the IGRA regulatory gap until "Indian lands" were in place. The Court incorrectly understood the argument to relate to the state's role in the gaming compact process under §2710(d)(3)("Federal approval is designed to ensure that the contracts tribes enter into are fair and reasonable. State compacts, however, are designed to protect the state's taxing authority and police powers over gaming and are not designed to protect tribal interests." (App. A, at 18a) However, Petitioners were not discussing the compact process. Petitioners meant that as long as the land remained under the jurisdiction of the state, because title had not vested in the

management contract with respect to which no Indian lands have attached would be a nullity.

E. "Indian Lands" as a Jurisdictional Requirement

Congress intended "Indian lands' to be the jurisdictional foundation for application of IGRA, including the Chairman's contract approval authority. In setting forth the policy for enactment in §2702, Congress declared that IGRA would establish a federal regulatory authority, federal standards, and a National Indian Gaming Commission for "gaming on Indian lands":

> "Declaration of Policy...(3) to declare that the establishment of independent Federal regulatory authority *for gaming on Indian lands*, the establishment of Federal standards *for gaming on Indian lands*, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect *such gaming* as a means of generating tribal revenue." (Emphasis supplied.)

§2710(d)(2)(A) requires that a tribe submit a resolution for approval of the Chairman relating to any *proposed* management contractor for a class III gaming activity. It supports the intent of Congress in §2702, that "Indian lands" must be in existence for a proposed management contract to be submitted for approval by the Chairman, and that the tribe "exercises governmental power" over the land, pursuant to §2703(4)(B).

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federal government, state law would apply to the contractual relationship between the parties. *See, e.g.*, *Sungold Gaming*, and *Trump Hotels & Casino Resorts Development Company*, note 24, *infra*.

§2710(d)(2)(A) provides:

> "If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity ***on Indian lands of the Indian tribe***, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b)." (Emphasis supplied.)

The statute has one meaning - that upon deciding to propose a management contractor to NIGC, a tribe must be in control of Indian lands. The statute contradicts the determination that Indian lands are not relevant in the contract approval stage, by adding a hurdle, not present under §81, that the "Indian lands" *also* be "*of the Indian tribe*". This is thoroughly consistent with the definition of Indian lands under §2703(4)(B), under which it is not sufficient that land be held in trust. The tribe must also "*exercise governmental power*" over the land.

In *Catskill*, even had the land been placed in trust for the Tribe, including, *arguendo*, under the Dictionary Act, if the Tribe did not currently "exercise governmental power", the land could not meet the definition.[13] Without Indian lands, IGRA is not triggered and NIGC has no jurisdiction to approve management contracts.[14]

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[13] *Catskill* fails to even mention the *exercise of governmental power* requirement.

[14] See, *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 702-03 (1st Cir. 1994) ("a tribe must exercise governmental power [over Indian lands] in order to trigger the Gaming Act"); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996) ("Gaming Act has no application to tribes...that do not exercise

F. DOI and NIGC "Memorandum of Agreement"

In 2007, DOI and NIGC executed an agreement confirming Indian lands are jurisdictional—"**Memorandum of Agreement between the National Indian Gaming Commission and Department of Interior**" February 26, 2007 ("**MOA**"), (App. H, at 303a), and must exist *before* a management contract cay be approved. Under the MOA, "Indian lands" are viewed as a prerequisite to the application of IGRA and the exercise of power by the Chairman.[15] The position of the United States Government is consistent with Petitioners' arguments in the Second Circuit.[16]

The MOA provides, in pertinent part:

> "2. The DOI agrees that deciding whether gaming is being conducted on Indian lands is ***a basic and essential jurisdictional requirement for the NIGC under the [IGRA]***.
>
> "15. It is the position of the Secretary not to approve compacts for gaming on Indian lands that have not been acquired into trust.

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jurisdiction over their territories, *see id.* [25 U.S.C.] §2710(b)(1) & (d)(3)(A)"); 56 FR 56278 (1991) ("This definition [of "Indian lands"] clarifies the language of IGRA...The significance of the definition is that the IGRA applies only to gaming conducted on Indian lands")

[15] The Indian Commerce Clause's grant of authority to the federal government, and preemption of state authority, extends only to activities occurring in "Indian country," i.e., **Indian lands** within the territory of the United States. *See* 18 U.S.C. §1151; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

[16] The MOU is published at—http://www.nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx

> "16. It is the position of the Chairman ***not to approve tribal ordinances or management contracts that are site specific*** **when they call for gaming on Indian lands that have *not been acquired into trust*.** The Chairman may continue to approve or disapprove ordinances and management contracts that are otherwise site specific." (Emphasis supplied.)

On May 12, 2000, NIGC Chief of Staff Barry Brandon responded to an inquiry by a member of the Catskill Group who had requested clarification that NIGC had not made any decision regarding the suitability of Alpha Hospitality, Inc. Particularly instructive is the language that sets forth the *official position of NIGC* on the status of the Tribe's application (**"NIGC Indian Lands Letter"**, App. P, at 333a):

> "Before the Chairman can approve a gaming management contract [,] the Chairman must be satisfied with the terms of the contract and the suitability of the persons and entities which will participate in the contract. *In the case of the management contract between the St. Regis Mohawk Tribe and Mohawk Management, LLC., there can be no approval before the land on which the facility is sited is taken into trust and the [S]tate of New York has entered into a compact with the St. Regis Mohawk Tribe for the conduct of class III gaming. Until those events occur, it is not appropriate for the Chairman to make a decision.* Therefore, I do not believe that anyone who represents the National Indian Gaming Commission, which is to say anyone familiar with the status of our review of this contract, would have made a statement indicating we had

> determined that Alpha Hospitality was unsuitable."

Petitioners find curious the recitation in *Catskill* that "NIGC denied Catskill Group's application several times." (App. A, at 5a) Clearly, no such determination had been made, *at any time*.

G. Case Law Prior to Amendment of §81

The MOA and NIGC Indian Lands Letter are consistent with case law. In *Forrest Associates v. Passamaquoddy Tribe*, 719 A.2d 535 (Me. 1998), §81 was found not applicable where a tribe that owned land in fee simple had applied to have the land placed in trust:

> "Examination of the ordinary meaning of the term 'Indian lands,' relevant case law, and the historic relationship between the federal government and Indian tribes, demonstrates that section 81 does not govern a contract concerning land not held in trust by the U.S. government at the time the contract is formed." *Id.* at 537.

The current definition of "Indian lands" was enacted shortly after *Forrest*. Had Congress intended to include non-trust lands, it surely could have done so in the face of a decision that only recently addressed the issue. Indeed, the opposite was true, as the legislative history points out:

> "Subsection (a) provides definitions for the terms 'Indian lands,' 'Indian tribe,' and 'Secretary.' Perhaps a definition for Indian lands is intended to circumscribe the scope of this statute to those lands where title *is held* in trust for a tribe or a restraint on alienation *exists* as a result of the principle, dating from the Revolutionary War

Era, that *the federal government must hold title to Indian lands in furtherance of the federal-tribal trust relationship.*"[17]

H. Transporting Indian lands "Back from the Future"

Perhaps not feeling completely comfortable with a pioneering decision that Indian lands are irrelevant to the management contract approval process, the *Catskill* panel added an alternate holding. The Court applied the Dictionary Act to establish Indian lands where none existed. The Court ruled that even if Indian lands were 'otherwise' required for application of IGRA approval process, a solution would be found in the Dictionary Act—by including *future* trust lands. In so holding, the Court rejected *Guidiville* and turned the IGRA definition on its head.[18]

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[17] Senate Report No. 106-150, Sept, 8, 1999, p. 8 (App. Z, at 459a) (Emphasis supplied.)

[18] The Dictionary act will generate unintended consequences to non-Indians. Consider a tribe that acquires an existing casino operated under state law on state land, with a management contract already in place. Should the management contract (or an existing long-term mortgage on the property) become void once the tribe applies for a transfer of the land into trust? *Catskill* did not provide guidance as to when land first becomes Indian lands under the Dictionary Act. Is it—

When a tribe decides to buy a particular parcel of land to serve as future trust land?

When a tribe enters into a contract to acquire the land?

When the tribe files an application with the Secretary of Interior?

When a "two-part" determination has been granted?

When the Secretary approves a tribe's application?

When the land is ready to be transferred under DOI regulations?

The Court found *Guidiville* distinguishable because it involved §81, and the land had not been identified. In contrast, *Catskill* involved an identified site and the applicable definition of "Indian lands" was under IGRA. To the extent these differences were not material to the majority opinion, the Court said it nevertheless agreed with the *Guidiville* dissent.

The *Catskill* panel ignored Petitioners' arguments that IGRA was founded on the basis of the Congressional intent, statutory provisions, and decisional law underlying §81 and that the policy and purpose of the statutes were similar. Under §2711(h), the authority of the Secretary to approve management contracts under §81 was "transferred" to the Chairman. Prior to IGRA, courts held that the Secretary was authorized to approve management contracts under §81, because they qualified as service agreements *relative to* tribal lands. Under IGRA, Congress removed that authority and transferred it to the Chairman. As a result, there is no distinction between the two statutes in relation to their underlying policies and the basis for their application founded on the existence of a government-to-government relationship relating to trust lands. *They are the same!*

§2711(h) is incorporated by reference under §2710(d)(9), the provision that requires management contracts to be approved by the Chairman:

> "An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be

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And, what if title is never actually transferred to the United States?

governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12 [25 USCS § 2711(b)-(d), (f)-(h)]."

In the twenty years since its enactment, no court has interpreted the term "Indian lands" under IGRA to include land that may be transferred into trust at some future date. There is certainly no purpose served by a precise statutory definition if land held *by non-Indians*, as in *Catskill*, qualifies as "Indian lands"; or, land that, *hypothetically*, might one day be held in trust is included. The *new* definition does just that, including land that may never be placed in trust. It renders meaningless the intent of Congress in drafting the definition.

ARGUMENT II

WHETHER CONGRESS INTENDED TO *PROHIBIT* INDIAN TRIBES FROM ENTERING INTO PRECURSORY AGREEMENTS TO SEEK REGULATORY APPROVAL UNDER THE INDIAN GAMING REGULATORY ACT OF 1988

A. Congressional Policy Favors Tribal Self Determination

The second question presented by the Petition relates to the policy of the United States with respect to tribal self determination in relation to IGRA. The general policy was set forth by Congress in the legislative history of the amendment of §81 with respect to agreements covered under that section. Its principles apply with equal force to IGRA.[19]

Catskill is a remnant of paternalism. The Court effectively ruled that a tribe is *prohibited* from enter-

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[19] Senate Report S. Rep. No. 106–150 (1999) (App. Z, at 445a).

ing into a precursory agreement to submit and seek approval of a **proposed** management contract, if the precursory obligation is contained within the "four corners" of the management contract. It is an all or nothing proposition. Any such agreement would be considered void.

The Court relied on *A.K. Management Co.* v. *San Manuel Band*, 789 F.2d 785 (9th Cir. 1986)("**A.K.**"), decided under the predecessor of §81. In 1988, however, §2711(h) removed management contracts from the application of §81 and transferred the authority of the Secretary to approve such contracts to the Chairman. As a result, *A.K.* has no further relevance to contracts regulated under §81 or its "offspring", IGRA, which did not adopt the "relative to" tribal lands language of §81 under which *A.K.* was decided.

The court that decided *A.K.* rejected it in *Guidiville:*

> "Even less (if indeed any) weight is to be ascribed to the comparable language employed in [*A.K.*], also sought to be relied on by appellees. [*A.K.*]. involved an earlier and substantively different version of Section 81—one that did not speak of "encumber[ing] Indian lands," but rather of agreements made with Indians that were "relative to their lands" (see 25 U.S.C. §81 as it existed until the year 2000). Moreover, [*A.K.*]. involved a dispute over land that was already held in trust by the United States for an Indian tribe. For more than one reason, then, that case does not at all influence today's outcome."[20]

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[20] *Guidiville*, at note 15 (App. C, at 220a). Under the "relative to" language, *any* agreement relating to *any* matter affecting tribal land would *literally* be void, including a good faith

A.K. predated the enactment of IGRA, which now provides a specific definition for the term "management contract" that did not exist under §81. **The IGRA definition specifically excludes from the term "management contract" any "*collateral agreement*" that does not provide for "management of a gaming operation."** This is a major distinction, particularly since *under IGRA* there is no requirement that a collateral agreement be sited in a separate instrument. A collateral agreement *may be oral or written*, Reg. §502.5, and there is no prohibition for it to be included as part of any other agreement, including a management contract. *See, e.g.*, prohibiting in §2711(g) (management contract may not involve real estate transactions).

The underlying policy under §81 took a dramatic turn when §81 was amended on March 14, 2000.[21] The amendment brought with it a *fresh* approach to the relationship of the United States and tribes, as Congress announced it favored tribal self determina-

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obligation to seek approvals. IGRA, on the other hand, contains no similar language. This is one of the reasons §81 was amended. S. Rep. No. 106–150, at 7 (1999) (App. Z, at 457a; *Cf.*, 461a)

[21] In the era when the BIA regulated gaming agreements (pre-IGRA), every agreement would be submitted for approval. Because the former Section 81 was "susceptible to the interpretation that any contract that 'touches or concerns' Indian lands must be approved," and, "because of the 'draconian' nature of the penalty for non-compliance," parties such as Catskill and the Tribe "frequently 'erred on the side of caution' by submitting any contract with a tribe to the BIA for approval." *Senate Report 106-150* (App. Z, at 457a, 461a). Even the LPA was submitted for Secretarial review, although the only approval needed was for the Permitted Exceptions to the real estate transfer. (App. Q, at 341a and 366a).

tion in the context of the review and approval of contracts with Indians under §81. In so doing, Congress criticized *A.K.*, describing *A.K.* as prescribing a "draconian remedy * * * [that] might cause more harm than good." S. Rep. No. 106–150, at 7 (1999) (App. Z, at 457a; *Cf.*, 461a), and that "[i]t seems likely that tribes may be hurt rather than protected by the disruption of their successful business relationships". *Id.* The Senate Report rejects the notion that tribes lack competence to incur binding precursory obligations, explaining that "[t]here is no justification for such an assumption to provide the basis for federal policy in this era of tribal self-determination." S. Rep. No. 106–150, at 8 (App.Z, at 445a, 459a) Plainly, Congress viewed federal pre-approval of the ***operational portion*** of a management contract (and the invalidity of that portion pending approval) as all the "paternalistic" protection tribes require.

This legislative policy furnishes additional justification, were any necessary, for adherence to the decision in *Vanadium Corp. of Am. v. Fidelity & Deposit Co. of Md.*, 159 F.2d 105 (2d Cir. 1947). The statute in *Vanadium*, 25 U.S.C. §396a, closely resembles §§81 and 2710(d)(9). The parties executed a contract assigning mineral rights on Indian lands. The contract expressly required approval by the Secretary. *Cf.*, Reg. §533.7 (Chairman's approval required for *assignment* of management contract).[22] Soon thereafter, the assignee refused to cooperate in seeking approval (which consequently was denied). The Second Circuit held that, notwithstanding the

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[22] Under §533.7, an assignment by a management contractor is treated in the same manner as an execution of the initial agreement. Both require the approval of the Chairman to be effective. Otherwise, they are void.

federal statute requiring Secretarial approval (and Interior's gloss declaring unapproved contracts "void") (*id.* at 108 (internal citations omitted)):

> "[A]n obligation to attempt in good faith to secure the prerequisite of the Secretary's approval would appear to rest upon both parties. * * * It was surely not the intent of the parties when they made an apparently binding assignment that the plaintiff should have the power to invalidate the assignment by not filing it for approval. On the contrary, it must have been assumed that plaintiff would reasonably file it and in good faith seek its approval...And plainly plaintiff was obligated to refrain from positive actions to prevent approval by the Secretary."

In other words, the impact of the statute requiring approval of the assignment was to void only ***implementation*** of the assignment (*i.e.*, actual commencement of mining operations) pending approval, not to void the precursory obligation to seek approval.[23]

As a practical matter, precursory agreements are *vital* to tribes to be able to secure initial predevelop-

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[23] *Vanadium* is included as an illustration in Restatement (Second) of Torts §245 cmt. A (1981)(Illustration 4):

> "A contracts to sell and B to buy A's rights as one of three lessees under a mining lease in Indian lands. The contract states that it is "subject only to approval by the Secretary of the Interior," which is required by statute. B files a request for approval but A fails to support B's request by giving necessary cooperation. Approval is denied and A cannot convey his rights. B has a claim against A for total breach of contract. A's breach of his duty of good faith and fair dealing contributed materially to the non-occurrence of the condition, approval by the Secretary of the Interior, excusing it."

ment funding and to pursue the planning and approval process.[24] Contrary to *Vanadium*, *Catskill* took the view that an obligation of good faith and fair dealing, contained within the four corners of a *proposed* management contract, was void along with the underlying contract for which approval was sought, elevating form over substance. A precursory obligation should not be void for such a technical reason. So long as the contract is not operative before it is approved, there is no abuse of the statute or ability to take advantage of a tribe by interlopers, and no need to be overly concerned from a paternalistic viewpoint.

B. Precursory Agreements under the DCA and MA

There were two "*Precursory Agreements*" involved in this case (and perhaps a third under the LPA assuming, *arguendo*, that the LPA is a management contract). These were the initial promises exchanged by the parties to use *commercially reasonable efforts* to seek approval of the DCA and the MA. Identical promises were made in the definition section of each agreement, under the term "Effective Date."

The DCA provided:

> "Effective Date" shall mean the date on which the *Secretary of the Interior* grants written approval of this Agreement. ***The parties agree to cooperate and to use their commercially reasonable efforts to satisfy the above condi-***

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[24] *See*, e.g., *Sungold Gaming Inc. v. United Nations of Chippewa Indians of Mich, Inc.*, No. 1:99-CV-181, 1999 WL 33237035 (W.D. Mich, June 7, 1999), and *Trump Hotels & Casino Resorts Development Company, LLC v. Roskow*, 2004 U.S. Dist. LEXIS 5401 (D.Conn. 2004).

> ***tion at the earliest possible date.***" (Emphasis supplied) (App. L, at 319a)[25]

The MA provided:

> "Effective Date" shall mean the date on which the *Chairman of the NIGC* grants written approval of this Agreement. ***The parties agree to cooperate and to use their commercially reasonable efforts to satisfy the above condition at the earliest possible date.***" (Emphasis supplied) (App. M, at 320a)

C. Collateral Agreements under IGRA

IGRA provides that, "An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman." §2710(d)(9). "Such contract shall become effective upon approval by the Chairman." Reg. §533.1. "Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the ...Chairman in accordance with the requirements of this part, are void." Reg. §533.7.

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[25] When amended in December 1999, the DCA was subject to approval *by the Secretary* as a service agreement *relative to* tribal lands. The land would have been in trust before the DCA became effective and the Secretary would not grant an approval before the land was actually held in trust. When the amendment of §81 was adopted in March 2000, the DCA no longer required Secretarial approval, because it did not "encumber" any land. The Court misunderstood these circumstances in determining the DCA was viewed *by the parties* as requiring regulatory approval of NIGC.

IGRA regulations define a "management contract" as—

> "...any contract, subcontract, or **collateral agreement** between an Indian tribe and a contractor ... if such contract or agreement **provides for the management of all or part of the gaming operation.**"). (Emphasis supplied). Reg. §502.15.

IGRA regulations further define a "collateral agreement" as—

> "...any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between the tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person related to a management contractor or subcontractor)." Reg. §502.5.

The Precursory Agreements are protected under the foregoing 'safe haven' for collateral agreements that carry no management responsibilities. This also applies to the LPA, as the LPA was no more than a land sale contract. The fact that a collateral agreement is purported to have excess compensation does not make it a management contract. NIGC may choose not to approve the management contract if changes it requests are not made, but there is no authority to disapprove a collateral agreement that has no *active* management functions.[26]

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[26] *See*, Washburn, "The Mechanics of Indian Gaming Management Contract Approval" 8 Gaming L.R. 333, at 344-346 (App. V, at 389a, 418a-423a (discussion of collateral agreement review and approval process)), and National Indian Gaming Commission, *Letter from Acting General Counsel William F. Grant, NIGC*

Since its enactment, IGRA has permitted collateral agreements to co-exist with management contracts. Had the Precursory Agreements in this case been executed as separate documents, they would have been characterized as "collateral agreements" that do not meet the definition of a "management contract". Such a distinction is not one Congress, or this Court, should favor in an era of tribal self determination. It is an elevation of *form over substance* in the extreme.

CONCLUSION

A. "Indian lands" Are Necessary for Application of IGRA

We have explained that "Indian lands" constitute the jurisdictional underpinning on which application of IGRA and exercise of jurisdiction by the Chairman over management contracts are based. The legislative history, statutes, decisions and agency pronouncements relating to IGRA are consistent. We have similarly pointed out that *Catskill* is an anomaly in a vast field of persuasive authority.

As Penny Coleman, Acting General Counsel of NIGC, aptly explained to the Senate Indian Affairs Committee in July 2005 (App. I, at 309a):

> **"Indian land is the foundation upon which Indian gaming is built**....[It] limits the Na-

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Mgmt. Contract Review President R.C.-St. Regis Mgmt. Co., January 9, 2004 (unpub.)(App. B, at 192a) (NIGC contract review and approval procedures; collateral agreement subject to approval if *actual* management role). Under the opinion, neither the DCA nor LPA would be subject to approval as a management contract, irrespective of whether the development fee or land price was purported to be excessive, because they had no active management role. Had NIGC made any such final determination, NIGC would have asked for voluntary revisions by the parties for the collateral terms in order to approve the management agreement.

> tional Indian Gaming Commission's regulatory authority to gaming that takes place on Indian Lands....Indian lands are central to many of the Commission's functions. ...*The Commission is...required to decide whether a specific parcel is Indian lands when a management contract or a site-specific* tribal ordinance has been submitted to the Commission for approval; such determinations are part of our final agency actions on management contracts and tribal ordinances." (Emphasis supplied.) [27]

In the 20-year history of IGRA, no court has looked into the future to find Indian lands exi t today because they might exist later in time. The federal relationship with Indians demands an *existing* foundation on which the government-to-government relationship relating to Indian gaming is based, and consistently applied. The conflict generated by *Catskill*, along with its negative impacts, call for a resolution by this Court.

B. IGRA Supports Self Determination

IGRA does not prohibit tribes from entering into precursory or other collateral agreements related to their gaming establishments, provided the agreements do not provide for the *management of a gaming operation*. The drafters of IGRA, perhaps as a result of the 'draconian' result in *A.K.* at the time, created a category of collateral agreements at IGRA's inception that would not require approval, but merely review. From a regulatory perspective, this is perfectly reasonable.

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[27] See also, National Indian Gaming Commission, Letter from Deputy General Counsel Penny J. Coleman, to Delaware Tribe of Oklahoma, July 30, 2001. (App. R, at 377a)

The Precursory Agreements in this case were collateral agreements sanctioned by IGRA, to seek regulatory approval, whether sited in a management contract or in a separate instrument. They allowed the Tribe to commit to pursue approval of the DCA and MA as the "consideration" for the Catskill Group's agreement to permit the Tribe to "lock up" the land under the LPA and start the regulatory approval process. The Tribe's ability to enter into a binding agreement to acquire the land and pursue the Project, without undue regulatory restrictions, is the essence of tribal self determination.

The Petition Should Be Granted

Based on the foregoing, Petitioners respectfully ask the Court to grant the Petition.

Respectfully submitted,

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January 16, 2009

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 06-5860-cv

CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., CATSKILL LITIGATION TRUST,

Plaintiffs-Appellants,

PAUL DEBARY, JOSEPH BERNSTEIN,

Consolidated Plaintiffs-Appellants,

Against.

PARK PLACE ENTERTAINMENT CORPORATION,

Defendant-Appellee,

HARRAH'S OPERATING COMPANY, INC.,

Consolidated-Defendant-Appellee.

May 12, 2008, Argued
October 21, 2008, Decided

OPINION

JUDGES: Before NEWMAN, WALKER, and SOTOMAYOR, *Circuit Judges*.

SOTOMAYOR, *Circuit Judge*

These consolidated cases involve a dispute between a group of entities vying for the right to develop a ca-

sino in the Catskills with the non-party Mohawk Indian Tribe ("the Tribe"). As explained further below, plaintiffs-appellants Catskill Development, L.L.C. ("Catskill"), Mohawk Management, L.L.C. ("Mohawk"), and Monticello Raceway Development Company, L.L.C. ("Monticello"), and consolidated-plaintiffs-appellants Paul DeBary and Joseph Bernstein (collectively, the "Catskill Group"),[1] claim that defendant-appellee Park Place Entertainment Corporation ("Park Place")[2] tortiously interfered with the Catskill Group's contractual and business relations with the Tribe, when Park Place entered into an exclusive agreement with the Tribe to develop a casino. We affirm the district court's dismissal of the Catskill Group's interference with contract claim on the ground that the Catskill Group's contracts with the Tribe were void and otherwise unenforceable at the time of the alleged interference. We affirm the district court's grant of summary judgment to Park Place on the Catskill Group's interference with business relations claim on the ground that the Catskill Group failed to establish a triable issue of fact that Park Place used wrongful means to interfere.[3]

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[1] Although consolidated-plaintiffs-appellants DeBary and Bernstein are not members of the Catskill Group, their arguments on appeal are identical to those of the remaining plaintiffs-appellants. Thus, for ease of reference, we draw no distinction between the two groups of appellants in characterizing their arguments on appeal, and refer to them collectively in this context as the Catskill Group. Further, as explained below, the Catskill Group is joined by the Litigation Trust, which is also a plaintiff to this case.

[2] Park Place is now owned by consolidated-defendant-appellee Harrah's Operating Company, Inc.

[3] We also affirm the district court's denial of the Catskill Group's motion for discovery sanctions because the district court

BACKGROUND

A. Regulatory Framework

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (2006), which provides a detailed regulatory framework for Indian gaming.[4] Congress's express purpose in passing IGRA was, inter alia, to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," while simultaneously "shield-[ing tribes] from organized crime and other corrupting influences [and] ensur[ing] that . . . Indian tribe[s are] the primary beneficiar[ies] of . . . gaming operation[s]." *Id.* § 2702.

To conduct gaming, an Indian tribe must satisfy numerous prerequisites. As relevant to this case, the gaming must take place "on Indian lands . . . located within a State that permits such gaming." *Id.* § 2710(b)(1)(A). IGRA generally prohibits gaming on lands that became Indian lands subsequent to IGRA's enactment in October 1988, unless the Governor of the relevant State "concurs" with a determination by the Secretary of the Interior that it "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." *Id.* § 2710(b)(1)(A).

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had already granted relief for the alleged infractions by reopening discovery, which we find to be an appropriate remedy.

[4] IGRA divides Indian gaming into three categories: Class I includes traditional forms of gaming engaged in during tribal ceremonies; Class II is principally comprised of bingo games; and Class III includes all other forms of gaming, including casino "standards" such as roulette, blackjack, and slot machines. 25 U.S.C. § 2703(6)-(8).

Moreover, IGRA provides for federal oversight of contracts between tribes and non-tribal entities regarding the management of tribal gaming operations. *Id.* §§ 2710(d)(9), 2711(a). Tribes may enter into contracts for the management of these gaming operations only with the approval of the National Indian Gaming Commission ("NIGC") Chairman. *Id.* § 2711(a)(1).[5] By regulation, unapproved management contracts are deemed "void." 25 C.F.R. § 533.7 (2008).

B. Factual Background

In 1996, the Catskill Group entered into a series of contracts with the Tribe[6] for the purpose of building and operating a casino at a site adjacent to the Monticello Raceway. Three of those contracts are at issue here:

> A Land Purchase Agreement ("LPA") between the Tribe and Catskill, which, *inter alia*, provided for Catskill's transfer of 29 acres of land to the United States to be held in trust for the Tribe;
>
> A Management Agreement ("MA") between the Tribe and Mohawk, which, *inter alia*, detailed the duties and responsibilities of Mohawk, and the fees for its management services; and
>
> A Development and Construction Agreement ("DCA") between the Tribe and Monticello,

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[5] As discussed further below, a "management contract" is defined in the governing regulations as "any contract . . . or collateral agreement between an Indian tribe and a contractor . . . if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.

[6] In the contracts the Tribe is referenced as the "St. Regis Mohawk Tribe." For simplicity, here the term "Tribe" is used throughout.

which, *inter alia*, provided for the construction and development of the casino and surrounding lands.

All of these agreements, in some manner, required the Tribe to use its best efforts and to cooperate with the Catskill Group in obtaining the requisite government approvals.[7] However, despite having spent millions of dollars, the Catskill Group still had not received all the necessary state and federal approvals by April 2000, and the NIGC had denied the Catskill Group's application several times. Although the United States Bureau of Indian Affairs (the "BIA") had agreed to take the land at issue in trust for the Tribe, final approval was never provided because the New York Governor had not yet consented to the transfer, and the BIA had not made a final determination that the price ($10 million) to be paid by the Tribe for the land transfer did not exceed the land's fair market value.

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[7] In particular, the LPA provided that: "The [Tribe] shall use its reasonable best efforts to cause this Agreement together with any other documents necessary to effectuate the Transfer to be filed with [the BIA]," and "the [Tribe] shall . . . cooperate with [Catskill] and any of its Affiliates and use [its] reasonable best efforts in good faith to assist in obtaining the approval of the [BIA] of the Trust Conveyance and any other documents or transactions related thereto."

The DCA provided that its provisions would become effective only upon receipt of the required regulatory approvals and further required the parties "to cooperate and to use their commercially reasonable efforts to satisfy [this] condition at the earliest possible date."

Likewise, the MA provided that the agreement would be effective on the date when "the Chairman of the NIGC grants written approval of this Agreement. The parties agree to cooperate and to use their commercially reasonable efforts to satisfy the above condition at the earliest possible date."

Meanwhile, in mid-1999, Park Place sought an introduction to the Tribe through Ivan Kaufman, CEO of Presidents Resorts Casino, Inc. ("Presidents"), and Gary Melius, a real-estate developer, each of whom had pre-existing relationships with the Tribe. According to the Catskill Group, Park Place falsely represented to Kaufman that it would reward his efforts of favorably introducing Park Place to the Tribe by buying out his substantial investment in, and taking over the management of, the Tribe's struggling Akwesasne casino. Park Place also allegedly offered to Melius millions of dollars for an introduction to the Tribe, to be paid upon Park Place's acquisition of the Akwesasne management contract or upon Park Place's securement of an agreement with the Tribe regarding gaming operations in the Catskills/Monticello area. However, after Kaufman and Melius introduced Park Place to the Tribe, Park Place allegedly disavowed the agreements it had reached with those individuals.[8]

The Catskill Group alleges that during the ensuing negotiations between Park Place and the Tribe, Park Place misrepresented to the Tribe, inter alia, that the federal approval granted to Catskill to take land into trust for purposes of gaming was "portable," and that a casino project on another site would be approved within four months. Finally, and as described further below, Park Place also allegedly concocted, participated in, and acquiesced in a scheme with Kaufman to place a financial "squeeze" on the Tribe by slowing the Akwasasne casino's payroll, with the hope and intent that the Tribe would turn to Park Place for a financial bailout.

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[8] Kaufman and Melius separately sued Park Place over the alleged breach of agreements and ultimately settled.

On April 14, 2000, the Tribe entered into a written agreement with Park Place, which set forth "certain understandings" reached between the parties: namely, that (1) Park Place would be the exclusive developer and manager of any Tribe casinos in New York (with certain exceptions not pertinent here); (2) Park Place and the Tribe would have a profit distribution of 70% to the Tribe and 30% to Park Place after the Tribe paid back Park Place for "advances" for the cost of development and construction; (3) Park Place would begin construction of a casino within 36 months unless otherwise agreed by the parties; (4) Park Place would pay the Tribe $3 million "for use by the Tribe in it's [sic] discretion," and which "shall be paid back to [Park Place] only in the event that the Tribe does not or is unable to enter into [certain] development, management and licensing agreements [with Park Place]; and (5) Park Place would indemnify the Tribe from litigation losses resulting from the Tribe's termination of its agreements with the Catskill Group.

Shortly after Park Place and the Tribe entered into this agreement, the Tribe and the Catskill Group ceased discussions with respect to the Monticello Raceway project.

C. Procedural History

Catskill, Mohawk, and Monticello (*i.e.*, the Catskill Group) commenced suit in November 2000 alleging, inter alia, that Park Place tortiously interfered with the Catskill Group's contractual relations with the Tribe ("Count I," or the "interference with contract claim"). In the alternative, the Catskill Group alleged that Park Place had tortiously interfered with its

business relationships with the Tribe ("Count II," or the "interference with business relations claim").[9]

Upon Park Place's motion, the district court dismissed Count I on the grounds that none of the contracts at issue was enforceable in the absence of NIGC approval. *Catskill Dev., LLC v. Park Place Entm't Corp.*, 144 F. Supp. 2d 215, 232-34 (S.D.N.Y. 2001) ("Catskill I"). The district court, however, permitted Count II to proceed on the ground that there was a question of fact regarding whether the Catskill Group's losses stemmed directly from Park Place's actions. *Id.* at 238-39.

The Catskill Group moved for reconsideration, arguing, inter alia, that one of the contracts at issue—the LPA in particular—was enforceable without NIGC approval. The district court agreed and reinstated the interference with contract claim with respect to the LPA only. *Catskill Dev., LLC v. Park Place Entm't Corp.*, 154 F. Supp. 2d 696, 703-05 (S.D.N.Y. 2001)

("Catskill II").

Park Place then moved the district court for reconsideration of that decision. While its reconsideration motion was pending, Park Place also moved for summary judgment on the remaining claims for tortious interference with business relations. The district court granted Park Place's motion for summary judgment, thus disposing of the entire case. *Catskill Dev., LLC v. Park Place Entm't Corp*, 217 F. Supp. 2d

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[9] The Catskill Group also alleged unfair competition and antitrust claims against Park Place under New York state law, which the district court dismissed for failure to state a claim and are not at issue on appeal. *Catskill Dev., LLC v. Park Place Entm't Corp.*, 144 F. Supp. 2d 215, 239-41(S.D.N.Y. 2001).

423, 446 (S.D.N.Y. 2002) ("Catskill II"). With respect to Count I, the court held (as it had originally held in Catskill I, but for different reasons) that the LPA was void without NIGC approval. *Id.* at 433. With respect to Count II, the court dismissed the interference with business relations claim on the grounds that the Catskill Group (1) offered no evidence that Park Place used "wrongful means" to induce the Tribe to terminate its relationship with the Catskill Group, and (2) could not meet its burden of showing that Park Place caused the Catskill Group any harm in light of the many speculative regulatory contingencies. *Id.* at 435-46.

While the Catskill Group's appeal from that decision was pending, it moved in the district court pursuant to Federal Rule of Civil Procedure 60(b)(3) to vacate the judgment based on the Catskill Group's discovery of six audio tapes relevant to the interference with business relations claim that had not been produced during the discovery period. The district court held that Park Place's failure to disclose the tapes was the apparent product of "mistake" or misunderstanding, but nevertheless constituted "misconduct" for purposes of Rule 60(b) reopening. *Catskill Dev., LLC v. Park Place Entm't Corp.*, 286 F. Supp. 2d 309, 315 (S.D.N.Y. 2003) ("Catskill IV"). The court granted the Catskill Group thirty days to conduct further discovery with respect to the matters raised in the tapes. *Id.* at 321.

Shortly thereafter, in January 2004, the members of the Catskill Group assigned "all of their right, title and interest in . . . any and all [its] claims . . . against Park Place" to a trust (the "Litigation Trust"). *See* Declaration of Trust of Catskill Litigation Trust,

§ 2.1.[10] The Litigation Trust was then added as a plaintiff to the case.

After further briefing following the close of the additional discovery period, the district court held that the Catskill Group still had failed to produce any evidence of wrongful means for purposes of the interference with business relations claim, and reaffirmed its grant of summary judgment in favor of Park Place. *Catskill Dev., LLC v. Park Place Entm't Corp.*, 345 F. Supp. 2d 360, 368 (S.D.N.Y. 2004) ("Catskill V"). The Catskill Group, now joined by the Litigation Trust, reinstated its earlier appeal.

On appeal, a jurisdictional defect was revealed for the first time: two of the original plaintiffs, Catskill and Mohawk, were not completely diverse from Park Place. Absent complete diversity, federal jurisdiction did not exist under 28 U.S.C. § 1332. We thus remanded the case to the district court to address, inter alia: (1) whether Park Place and Monticello were completely diverse for jurisdictional purposes at the time the action was commenced; and (2) whether dismissal of Catskill (the signatory to the LPA) and Mohawk (the signatory to the MA) from the case would result in undue prejudice to Monticello (the signatory of the DCA) or Park Place.[11] *Catskill Litig. Trust v. Park Place Entm't Corp.*, 169 Fed. App'x 658, 660-61 (2d Cir. 2006).

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[10] Available at http://www.sec.gov/Archives/edgar/data/1278539/000092189504000172/ ex32tos 1_02032004.htm.

[11] We also remanded for the district court to determine whether Monticello was a third-party beneficiary of the LPA and whether New York law permits a third-party beneficiary of a contract to recover damages for tortious interference with that contract, but those issues are not pertinent to our disposition of the case.

Upon the parties' stipulation, the district court signed an order, pursuant to Federal Rule of Civil Procedure 21, dismissing from the original action all but Monticello and Park Place, which the district court determined were completely diverse at the time the original complaint was filed.[12] Subsequently, the trustees of the Litigation Trust filed a new complaint against Park Place, and the district court consolidated the new and original actions under Federal Rule of Civil Procedure 42(a). *Debary v. Harrah's Operating Co.*, 465 F. Supp. 2d 250, 260 (S.D.N.Y. 2006) ("Catskill VI"). Additionally, the stipulation among the parties provided sufficient evidence that no party to the litigation would "suffer prejudice by virtue of the dismissal." *Id.* (citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989)).

After six district court opinions and two prior appeals, the case now returns to us for a third time.

DISCUSSION

I. JURISDICTION

Although the parties do not contest our jurisdiction, we are obliged to ascertain it independently. *See, e.g., Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006) ("Although neither party has suggested that we lack appellate jurisdiction, we have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*."). We conclude

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[12] Pursuant to the Rule 21 factors, the district court found "that Catskill and Mohawk were dispensable parties given that complete relief could be accorded between the remaining parties, and because any judgment against Monticello in this action would have preclusive effect against Catskill and Mohawk." *Debary v. Harrah's Operating Co.*, 465 F. Supp. 2d 250, 260 (S.D.N.Y. 2006).

that we have jurisdiction over both the original and consolidated action. First, with respect to the original action that we previously remanded for a jurisdictional finding, we see no factual error in the district court's determination that the remaining parties—Monticello and Park Place—were completely diverse at the time that action was commenced.

Second, with respect to the subsequently commenced action by the trustees, we are satisfied upon our review of the trust agreement and our questioning of the parties at oral argument that diversity jurisdiction exists over that action as well. For purposes of diversity jurisdiction, the citizenship of the fiduciary—not the beneficiary—generally controls. *See O'Brien v. AVCO Corp.*, 425 F.2d 1030, 1032 (2d Cir. 1969) (citing *Dodge v. Tulleys*, 144 U.S. 451, 12 S. Ct. 728, 36 L. Ed. 501 (1892)). An exception exists where there is evidence of collusion for the purpose of obtaining federal jurisdiction. *See* 28 U.S.C. § 1359; *See also Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 465-66, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980) (holding that trustees who were "real parties in interest" could invoke diversity jurisdiction on the basis of their own citizenships, in the absence of allegations of sham or collusion to manufacture diversity jurisdiction).

Specifically, under the so-called "anti-collusion" statute, 28 U.S.C. § 1359, "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." We explained in *Airlines Reporting Corp. v. S & N Travel, Inc.* that:

> We give careful scrutiny to assignments which might operate to manufacture diversity jurisdic-

> tion, the reasons for which we have made abundantly clear: such devices, unless controlled, can provide a simple means of expanding federal diversity jurisdiction far beyond [its] purpose. The cautious eye with which we view such assignments ensures that parties do not inappropriately channel ordinary tort and contract litigation, essentially disputes of a local nature, into the federal courts. Accordingly, we construe section 1359 broadly to bar any agreement whose "primary aim" is to concoct federal diversity jurisdiction.

58 F.3d 857, 862 (2d Cir. 1995) (citations and quotation marks omitted); *See also Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 825-26, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969) (explaining that the purpose of the anti-collusion statute was "to prevent the manufacture of Federal jurisdiction by the device of assignment") (internal quotation marks omitted). In assessing whether an assignment is improper or collusive, several factors may be relevant, including but not limited to: "the assignee's lack of a previous connection with the claim assigned; the remittance by the assignee to the assignor of any recovery; whether the assignor actually controls the conduct of the litigation; the timing of the assignment; the lack of any meaningful consideration for the assignment; and the underlying purpose of the assignment." *Airlines Reporting Corp.*, 58 F.3d at 863 (citations omitted). No single factor is dispositive. *Id.*

Here, we are satisfied that the Litigation Trust was not created for the improper purpose of manufacturing federal jurisdiction. To begin with, we are assured by appellants' counsel that the Trust was created prior to counsel's discovery of the jurisdictional

defect. Moreover, a SEC filing supports the appellants' assurances to us that the Litigation Trust was created for a legitimate business purpose; to wit, as a "condition to closing" a consolidation deal among Catskill, Mohawk and Monticello. Finally, the express terms of the Trust agreement place full responsibilities and powers over the litigation in the Trustees, and we have no reason to believe that these terms of the agreement are not being honored. We are thus satisfied that jurisdiction exists over the consolidated cases before us. *See Navarro*, 446 U.S. at 463-65.

II. INTERFERENCE WITH CONTRACT CLAIM

To state a contract-interference claim under New York law, a plaintiff must demonstrate the existence of a valid contract, the defendant's knowledge of the contract's existence, that the defendant intentionally procured a contract breach, and the resulting damages to the plaintiff. *E.g., Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 595 (2d Cir. 1996); *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y. 2d 413, 424, 646 N.Y.S. 2d 76, 82, 668 N.E.2d 1370, 1375 (1996). Only the first element—the existence of a contract—is at issue here. The district court held that the Catskill Group could not satisfy this element as a matter of law because its contracts with the Tribe were void in the absence of prior NIGC approval under 25 C.F.R. § 533.7 (providing that "[m]anagement contracts . . . that have not been approved by the Secretary of the Interior or the Chairman . . . are void").

On appeal, the Catskill Group raises three principal challenges to the district court's determination in this regard. First, it claims that the federal voiding provisions do not apply to any of the contracts at is-

sue—the MA (Management Agreement), the LPA (Land Purchase Agreement), and the DCA (Development and Construction Agreement)—because these contracts concern lands that are not yet "Indian lands." Second, the Catskill Group argues that the voiding provisions do not invalidate the Tribe's precursory obligations to act in good faith in seeking required agency approvals. Third, it argues that even if the voiding provision of 25 C.F.R. § 533.7 applies to the MA, it does not apply to the LPA or DCA because those agreements do not contain gaming management provisions.[13] We address, and reject, each of these assertions in turn below.

A. "Indian Lands"

IGRA defines "Indian lands," in relevant part, as "lands within the limits of any Indian Reservation" or "lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4) (emphasis added).[14] The Catskill Group argues that while the LPA contemplated a land transfer from Catskill to the United States in trust for the Tribe, the land was owned by Catskill at all relevant times, and thus was not land that "is" Indian land subject to the NIGC's voiding provision. The Catskill Group further asserts that this interpretation does not result in a regulatory gap because any proposed gaming on lands not yet held in trust would be regu-

[13] The Catskill Group also alleges that New York law allows a contract interference claim even where the underlying contract is void under federal law. Because New York law plainly predicates contract interference on the existence of a valid contract, this argument is frivolous.

[14] Likewise, 25 U.S.C. § 81 defines "Indian lands" to include "lands the title to which is held by the United States in trust for any Indian tribe." (emphasis added).

lated by state law, and nothing in IGRA would require states to allow Indian gaming on the site. We disagree with this interpretation of IGRA.

To begin with, the NIGC's authority to approve management contracts does not appear to hinge on whether the contract relates to Indian lands. Neither the governing statutes relating to gaming management contracts, 25 U.S.C. §§ 2710(d)(9), 2711, nor the NIGC's implementing regulations, 25 C.F.R. §§ 533.1, 533.7,[15] expressly require that a gaming contract relate to Indian lands for it to be subject to NIGC approval. Indeed, the absence of any mention of "Indian lands" in § 2710(d)(9) or § 2711 stands in contrast to many of the surrounding statutory provisions, which are expressly limited in some way to Indian lands. *See, e.g.*, 25 U.S.C. §§ 2710(d)(1), (2), (3), (5), (7), (8) (relating to class III gaming "on Indian lands"); *Id.* §§ 2710(b) (1), (2), (4) (relating to class II gaming "on Indian lands").

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[15] 25 C.F.R. § 533.1 provides:

> Subject to the Chairman's approval, an Indian tribe may enter into a management contract for the operation of a class II or class III gaming activity.
>
> (a) Such contract shall become effective upon approval by the Chairman.
>
> (b) Contract approval shall be evidenced by a Commission document dated and signed by the Chairman. No other means of approval shall be valid.
>
> (c) Contracts approved by the Secretary remain effective until approved or disapproved by the Chairman.

25 C.F.R. § 533.7 provides:

> Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void.

Even if we were to read an "Indian land" requirement into the governing statutes and regulations at issue, we would nevertheless reject the Catskill Group's proposed application of any such requirement to the circumstances of this case. The Dictionary Act, 1 U.S.C. § 1, instructs that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." Thus, when construing the definition of "Indian lands" in 25 U.S.C. § 2703(4), the Dictionary Act instructs us to read the words "which is held in trust" to also include land that will be held in trust. *Cf. Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 784 (9th Cir. 2008) (Smith, *J.*, dissenting).[16] The Catskill Group's narrow interpretation—which would give the NIGC review authority over only contracts relating to already existing Indian land—would thwart Congress's intent to have the NIGC oversee contracts for the purpose of pro-

[16] In Guidiville, the Ninth Circuit addressed the meaning of "is" in the context of 25 U.S.C. § 81's definition of Indian lands. 531 F.3d at 774. The majority opinion concluded, in that context, that "is" should be given its literal meaning and that the Dictionary Act did not apply because the "context" in which the term was used appeared to indicate that Congress did not intend "is" to mean "will be." *Id.* at 774-79. Guidiville is distinguishable insofar as it was interpreting § 81, which expressly pertained to encumbrances of "Indian land," rather than to management contracts. *Id.* at 769. Moreover, in Guidiville, no land had yet been acquired or even identified for gaming purposes by either of the contracting parties. *Id.* at 770-71. To the extent these differences are not material to the Ninth Circuit's majority opinion, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that "will be" held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements. *See Id.* at 783-87.

moting the best interests of Indian tribes. *See* 25 U.S.C. §§ 2701, 2702. There is no dispute here that the purpose of all of the contracts at issue was to build and operate a casino on what was intended to become Indian land. Indeed, in the absence of acquisition of Indian land, the casino project was a nonstarter both by law, *See* 25 U.S.C. § 2701(5), and contract.

Moreover, the Catskill Group's argument that states would fill the IGRA regulatory gap falls short. Congress intended that there would be both federal and state review of gaming contracts; however, the two serve entirely separate functions. Federal approval is designed to ensure that the contracts tribes enter into are fair and reasonable. State compacts, however, are designed to protect the state's taxing authority and police powers over gaming and are not designed to protect tribal interests.

In reaching our conclusion that the NIGC's review and approval authority extends to the contracts at issue, we have considered the 2000 opinion letter by the deputy general counsel for the NIGC issued in an unrelated case—but relied upon by the Catskill Group here—that asserts that land intended to be placed into trust, but not yet held in trust by the United Sates, is not Indian land. *Letter from Penny J. Coleman, Deputy General Counsel, NIGC to Chief, Region V* (July 30, 2001) ("Coleman Opinion Letter").[17] Because this position was set forth in an

[17] The Opinion Letter states: "While we understand that the Tribe seeks to have these lands placed into trust, these lands are not presently held in trust by the United States for the benefit of the Tribe. Therefore, the lands . . . are not trust lands [for purposes of 25 U.S.C. § 2703(4)(B)]," and are thus not Indian lands. Coleman Opinion Letter at 3.

opinion letter and has not been promulgated by an NIGC regulation, this Court owes it only the limited deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (holding that agency interpretations in opinion letters "lack the force of law" and are entitled only to *Skidmore* deference). As such, the interpretation reflected in the Coleman Opinion Letter is entitled to deference only to the extent that it has the power to persuade us. *Id.* We conclude this letter lacks persuasive power.

The Opinion Letter is based on nothing more than a literal reliance on the statutory language's use of the present tense, which, for the reasons we have already explained, is contrary to the Dictionary Act and would be inconsistent with congressional design. Moreover, we have reason to doubt that the deputy counsel expected her opinion to be binding in future, unrelated cases. Her conclusions were hedged as "preliminary" and were expressly limited to the facts before her. *See* Coleman Opinion Letter at 1. Further, we believe it is telling that in the cases currently before us, the NIGC actively reviewed the at-issue contracts, and, as discussed further below, rejected them. Thus, to the extent the Opinion Letter reflected NIGC policy regarding "Indian lands," this policy appears to be inoperative based on the NIGC's actions in these cases. Under these circumstances, we decline to defer to the Opinion Letter.

B. "Operative" Versus "Precursory" Obligations

We also reject the Catskill Group's assertion that the federal voiding provisions apply at most to the "operative" provisions of the contracts at issue, but not the "precursory" obligation of the Tribe to use

reasonable best efforts in obtaining the requisite government approvals. The same argument was rejected by the Ninth Circuit in *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 788-89 (9th Cir. 1986). In *A.K.*, a bingo contractor entered into an agreement to construct a bingo facility and operate bingo games on the Indian tribe's reservation. *Id.* at 786. The agreement was never signed or approved by the BIA, which, prior to the establishment of the NIGC, was the agency responsible for overseeing gaming contracts under 25 U.S.C. § 81. *Id.* Three days after the agreement was signed, the contractor was notified that the Indian tribe would not recognize the agreement. *Id.* The contractor filed a suit in district court seeking a declaration that the agreement was valid, binding, and enforceable, but the district court dismissed the contractor's complaint. *Id.* On appeal, the contractor argued, inter alia, that the tribe was subject to both an express and implied duty of good faith and fair dealing to seek the BIA's approval. *Id.* at 788. The contractor further argued that the tribe should not be allowed to escape contractual liability by its own failure to act. The Ninth Circuit rejected these arguments, explaining:

> Whatever the persuasive force of these arguments, it is doubtful that general contract principles apply to an agreement subject to 25 U.S.C. § 81 (1982). Section 81 explicitly provides that a contract is "null and void" without written approval from the BIA. Therefore it is logical to conclude that an agreement without BIA approval must be null and void in its entirety. No part of it may be enforced or relied upon unless and until BIA approval is given. BIA approval is an absolute prerequisite to the enforceability of the contract. To give piecemeal effect to a con-

> tract as urged by [appellant], would hobble the statute. The plain words of section 81 simply render this contract void in the absence of BIA approval. Since it is void, it cannot be relied upon to give rise to any obligation by the [tribe], including an obligation of good faith and fair dealing. Accordingly, we find that general contract principles do not impose a duty on the [tribe] to seek BIA approval of the Agreement.

Id. at 789 (footnote omitted).

We are persuaded by both the reasoning and holding of A.K. Like § 81, the federal review provisions at issue in our case are broadly worded, are designed to protect the best interests of Indian tribes, and do not draw the distinction between operational and precursory obligations urged upon us by the Catskill Group.

Moreover, we are unmoved by the Catskill Group's broader policy argument that the enforcement of good faith obligations is, on balance, in the best interest of Indian tribes. Specifically, the Catskill Group argues that it "hardly serves tribal interests to have 'freedom' to walk away from a bargained-for obligation to seek approval after its contracting partner has spent much time and money doing the arduous legwork involved in the approval process; rather, this will only imperil a tribe's ability in the first instance to find worthy partners prepared to contract on favorable terms."

While in theory it is possible that investors may be less inclined to deal with Indians who are free to disregard obligations to perform in good faith, we are aware of no empirical evidence that supports this concern. Indeed, to allow tribes the ability to walk

away from a deal prior to agency approval seems at least equally likely to promote the ends of IRGA: an investor who fears losing a tribe's partnership to a competitor can protect itself by offering a more attractive deal to a tribe, which is in that tribes's best interest.

Finally, the Catskill Group's reliance on *Vanadium Corp. of Am. v. Fidelity & Deposit Co.*, 159 F.2d 105 (2d Cir. 1947), is unavailing. In *Vanadium*, two non-Indian parties contracted for a variety of mining lease assignments. *Id.* at 106. Because the land underlying the leases belonged to the Navajo tribe of Indians, a federal statute was triggered, requiring pre-approval by the Secretary of the Interior for any transfer or assignment of a mining lease on Indian land. *Id.* (citing 25 U.S.C. § 396a). Additionally, the parties separately contracted for a provision providing that "in the event the assignments were not approved . . . the agreement would be deemed cancelled." *Id.* Thereafter, the plaintiff determined that the assignments were unfavorable, refused to cooperate in seeking federal approval (which consequently was denied), and sought return of his deposit, arguing that the contracts were "dead" without approval. *Id.* at 107-08. This Court disagreed, explaining that "[i]t was surely not the intent of the parties when they made an apparently binding assignment that the plaintiff should have the power to invalidate the assignment by not filing it for approval. On the contrary, it must have been assumed that plaintiff would reasonably file it and in good faith seek its approval." *Id.* at 108.

While the above-quoted language from Vanadium offers some support for the Catskill Group's theory that agreements to act in good faith are enforceable

even prior to receipt of government approval, Vanadium did not establish a *per se* rule to that effect. Moreover, Vanadium is distinguishable from this case in two crucial respects. First and foremost, in Vanadium the plaintiff's argument that the agreement was void absent federal approval had a contractual genesis; neither the statute nor regulation at issue, 25 U.S.C. § 396a and 25 C.F.R. § 186.26, contained a voiding provision. Accordingly, this Court applied the general contract principle of good faith to decide the case. *See Id.* at 108 (noting plaintiff's breach of a "condition precedent"—good faith—to the contract and citing to the Restatement (Second) of Contracts § 395). Here, however, we confront a voiding provision entrenched within a federal regulation, 25 C.F.R. § 533.7, suggesting a federal intent that, lacking the Secretary's approval, contracts subject to IGRA are void *ab initio*, notwithstanding general contract principles to the contrary, like good faith. Second, unlike in this case, the parties in *Vanadium* were not Indian, thus the underlying policy of promoting Indian interests was not upset by the invocation of general contract principles. Indeed, such policy concerns did not appear to have been given any consideration by the panel in that case.[18]

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[18] The Catskill Group also relies on *Thorstenson v. Norton*, 440 F.3d 1059, 1060 (8th Cir. 2006), where an Indian and his non-Indian wife contracted to sell various land tracts to two non-Indian purchasers (Thorstenson's predecessors-in-interest), including land held in trust by the United States. Under 25 C.F.R. § 152.17, trust land requires authorization from the Secretary of the Interior before it can be sold, and a separate contract stipulated that if such authorization was not acquired the sellers would transfer into escrow money the buyers had already conveyed as a down payment. *Id.* at 1060-61. The sellers ultimately refused to transfer the trust land and never placed the buyers' (now *Thorstenson's*) deposit into escrow. *Id.* at 1061.

Accordingly, we reject the Catskill Group's contention that the purported good-faith obligations in the contracts somehow bound the Tribe to use reasonable best efforts in obtaining the requisite government approvals.[19]

Thorstenson successfully sued for the return of the deposit money, as the Eighth Circuit concluded that "[w]hether or not the BIA had yet approved of the initial contracts is neither here nor there as to *Thorstenson's* recovery for money paid, prematurely, for the trust land at issue . . . ." *Id.* at 1064. The Catskill Group uses *Thorstenson* to buttress its "precursory obligation" theory that even if the agreements at issue are generally void without NIGC approval, provisions that required the Tribe to act in good faith, like the escrow agreement in *Thorstenson*, are enforceable. But *Thorstenson* does not analogize well to the situation before us and is thus unpersuasive. The court in *Thorstenson* emphasized the "separate nature of the escrow agreement" and that the claim for the return of the deposit "did not involve title to the trust land at all—only money." *Id.* at 1064. At most, *Thorstenson* stands for the proposition that a buyer has legal recourse where a Native American seller breaches an escrow agreement to return the buyer's deposit if a sale of trust land is not consummated. *See id.* ("Nothing should hinder an Indian's right to enter into a binding escrow agreement that states 'I'm going to comply with the law.'"). But here, the Catskill Group seeks prospective damages, which are intimately tied to a variety of casino operating contracts that failed to receive federal approval. Without such approval those contracts are void, just like the underlying contract for the sale of land in *Thorstenson*, which the Eighth Circuit—separate from its analysis of the escrow agreement—notably deemed unenforceable absent BIA approval. *See id.* 1064-65 n.4 (finding that Thorstenson "has no tenancy rights at this time and it was unreasonable for him to believe otherwise" because "that tenancy is subject to BIA approval, which has not yet been given").

[19] We leave open the issue of whether other types of contractual obligations in management contracts (*e.g.*, arbitration clauses) are severable and enforceable prior to receiving government approval of the contract as a whole. For purposes of

C. Management and Collateral Agreements

Having rejected the Catskill Group's threshold "Indian land" and "precursory obligation" arguments, we now turn to the question of whether the contracts at issue were "management contracts" void under 25 C.F.R. § 533.7, or otherwise unenforceable. *See Scutti Enters., LLC v. Park Place Entm't Corp.*, 322 F.3d 211, 215 (2d Cir. 2003) ("[I]n the absence of an enforceable contract, it was appropriate to dismiss Scutti's cause of action for tortious interference with contractual relations.").

As noted above, § 533.7 provides that: "Management contracts . . . that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void." 25 C.F.R. § 533.7 (emphasis added). In turn, the regulations define a "management contract" as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor . . . if such contract or agreement provides for the management of all or part of a gaming operation." *Id.* § 502.15 (emphasis added). A "collateral agreement" includes "any contract . . . that is related, either directly or indirectly, to a management contract." *Id.* § 502.5.

As an initial matter, the MA (Management Agreement) entered into between Mohawk and the Tribe, which provided for the management of the putative casino, is clearly subject to section 533.7's voiding provision. The more difficult question is whether the remaining two contracts at issue—the LPA (Land

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this case, we hold only that the obligation to act in good faith, and general contract principles that favor such a policy in other contexts, yield to the regulatory dictate that unapproved contracts are void. *See* 25 C.F.R. § 533.7.

Purchase Agreement) entered into between Catskill and the Tribe, and the DCA (Development and Construction Agreement), entered into between Monticello and the Tribe—are also subject to the voiding provision or are otherwise unenforceable.

It is undisputed that both the DCA and LPA are "collateral agreements" to the MA insofar as they are "related" to that contract. *See id.* § 502.5. But a collateral agreement is subject to agency approval under *Id.* § 533.7 only if it "provides for the management of all or part of a gaming operation." *Id.* § 502.15; *See also Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 665-67 (W.D. La. 2005).[20] Whether an agreement meets this requirement depends on the circumstances and is not always self-evident. *See First Am. Kickapoo Operations L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1172-75 (10th Cir. 2005) (holding that operating lease constituted a management agreement); *Machal*, 387 F. Supp. 2d at 667 (holding that a "settlement agreement," which expressly purported not to be a "gaming agreement," was in fact a management contract insofar as it allocated management authority in regards to a casino); *See also* 57 Fed. Reg. 12,382-01, 12,388 (April 9, 1992) (NIGC will review for approval any agreement, however labeled, the subject matter of which is the "management of a gaming operation").

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[20] To the extent that the district court interpreted the regulations as requiring NIGC approval of all collateral contracts, it erred. However, we affirm the district court's decision for the reasons explained in the text. *See ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 155 (2d Cir. 2003) ("Our court may, of course, affirm the district court's judgment on any ground appearing in the record, even if the ground is different from the one relied on by the district court.").

In this case, Park Place argues that the DCA and LPA were management contracts insofar as they contained hidden management fees. In particular, Park Place claims that the DCA's 5% development fee and the LPA's $10 million purchase price were intended as back-door management compensation. Further, with respect to the DCA only, Park Place points out that Monticello was to be repaid for the construction of the proposed casino from the proceeds derived from the operation of the casino. *See Machal*, 387 F. Supp. 2d at 667-68 (holding that one of the agreements at issue was a management contract, in part, because it required the tribe to repay from gaming revenues the loans it received from plaintiff for construction of the casino and other costs); *See also In re SRC Holding Corp.*, 352 B.R. 103, 174-78 (Bankr. D. Minn. 2006) (pledge agreement that purported to assign to lender the manager's rights to management fees constituted a management contract subject to NIGC approval), *rev'd in part on other grounds*, 364 B.R. 1 (D. Minn. 2007).

We need not independently determine whether the DCA or LPA are collateral agreements subject to agency approval because: (1) the agency appears already to have made that determination, *See United States ex. rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 425 (8th Cir. 2002) (deferring to NIGC's determination that agreement was a management contract subject to approval); (2) at all relevant times the contracting parties treated these agreements as being subject to agency approval; (3) and the terms of the contracts themselves contemplated agency approval, *See Scutti*, 322 F.3d at 215 (agreeing with district court finding that "under its unambiguous terms, Scutti's proposed contract with the Mohawks

was not effective or binding—and therefore not enforceable—until approved by the NIGC").

Specifically, both the DCA and the LPA were submitted to the NIGC for review. With respect to the DCA, the NIGC's Director of Contracts stated in an April 19, 2000 letter denying agency approval that it had "determined that the [MA] and DCA together are management contracts and are subject to NIGC approval." Moreover, with respect to the LPA, the NIGC Director of Contracts by letter twice requested an explanation for the Tribe's proposed purchase price for the land, and expressed the concern that the purchase price was a hidden management compensation. Although the Catskill Group responded that the purchase price was a fair one, at no time did it challenge, at the agency level, the NIGC's determination that the LPA was subject to its approval. The same is true with respect to the terms of the DCA. Indeed, in Master Agreements entered into between the Tribe and the Catskill Group in 2000, the parties expressly recited that the agreements "for the purchase of the property, [*i.e.*, the LPA] and the development, [and] construction . . . of the gaming facility" [*i.e.*, the DCA] had been submitted to the NIGC and the BIA "for review and approval." (emphasis added). Moreover, by their terms both the LPA and DCA contemplated *prior* agency approval by the BIA. In particular, the DCA's effective date was contingent upon receipt of BIA approval, while the LPA's land deal was contingent upon the BIA's approval of the transfer of land into trust for the Tribe.

Under these circumstances, we conclude that all of the contracts at issue were void under § 533.7 absent the requisite agency approval(s). Accordingly, we af-

firm the district court's dismissal of the Catskill Group's interference with contract claim.

III. INTERFERENCE WITH BUSINESS RELATIONS CLAIM

In the absence of enforceable contracts, the Catskill Group hopes to prevail on a claim for tortious interference with business relations. To state a claim for this tort under New York law, four conditions must be met: (1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's acts injured the relationship. *See Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 214 (2d Cir. 2002) (describing the tort by an alternative name, "tortious interference with prospective economic advantage"); *Goldhirsh Group, Inc. v. Alpert* 107 F.3d 105, 108-09 (2d Cir. 1997) (stating the elements as constitutive of "tortious interference with . . . business relations"). Only the third and fourth elements are at issue here, and we do not reach the latter because we conclude below that the Catskill Group has failed to present a triable issue of fact on element three, wrongful means.

The wrongful means requirement makes alleging and proving a tortious interference claim with business relations "more demanding" than proving a tortious interference with contract claim. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 632, 406 N.E.2d 445, 449-50 (1980) (describing the interference with business relations tort by an alternative name, "interference with prospective contractual relations" and describing element three as "wrongful means"). The standard is more demanding because a plaintiff's

mere interest or expectation in establishing a contractual relationship must be balanced against the "competing interest of the interferer," *id.*, 428 N.Y.S.2d at 632, 406 N.E.2d at 449, as well as the broader policy of fostering healthy competition, *NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614, 623, 641 N.Y.S.2d 581, 586, 664 N.E.2d 492, 497 (1996). While a defendant's commission of a "crime or an independent tort" clearly constitutes wrongful means, such acts are not essential to find wrongful means. *See Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189, 785 N.Y.S.2d 359, 361-62, 818 N.E.2d 1100, 1102-03 (2004); *See also Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 206 (2d Cir. 1998) (holding that participating in a knowing breach of fiduciary duty can constitute wrongful means).

Here, the Catskill Group contends that the record contains ample evidence to permit reasonable jurors to conclude that Park Place engaged in wrongful means. The Catskill Group's claim centers around the following three themes:

> Park Place defrauded two individuals—Gary Melius and Ivan Kaufman—to obtain favorable introductions to the Tribe, and then defrauded the Tribe by falsely representing to the Tribe that no delay in the project would be occasioned by partnering with Park Place;
>
> Park Place committed the tort of knowing participation in another's breach of fiduciary duty, specifically Kaufman's breach of his fiduciary duty to the Tribe, by intentionally slowing payroll at the Akwesasne casino. Park Place then "ratified" or knowingly accepted the benefits of that breach by positioning itself as the Tribe's financial savior; and

Park Place exerted economic pressure on the Tribe by making Park Place's $3 million loan to the Tribe contingent upon the Tribe's abandonment of the Catskill Group.

We reject each of these theories.

A. Park Place's Alleged Fraud

1. Alleged Fraud Against Melius and Kaufman

There is no dispute that Park Place gained initial access to the Tribe through Melius and Kaufman, each of whom had pre-existing relationships with the Tribe. The Catskill Group contends, however, that Park Place used fraudulent means to induce Melius and Kaufman to introduce Park Place to the Tribe, thereby committing the requisite wrongful act for an interference claim.

The district court—without determining whether Park Place had engaged in the fraud alleged—held that Park Place's action could not form the basis of an interference with business relations claim because the alleged conduct was not directly injurious to either the Catskill Group or the Tribe. *Catskill III*, 217 F. Supp. 2d at 439-40. The district court's holding is entirely consistent with what we have previously recognized in other contexts: a plaintiff must "demonstrate both wrongful means and that the wrongful acts were the proximate cause" of the alleged injury. *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 171-72 (2d Cir. 2004) (citing *Pacheco v. United Med. Assocs.*, P. C., 305 A.D.2d 711, 712, 759 N.Y.S.2d 556 (3d Dep't 2003)); *Jabbour v. Albany Med. Ctr.*, 237 A.D.2d 787, 790, 654 N.Y.S.2d 862 (3d Dep't 1997). Because any fraud by Park Place against Kaufman and Melius did not di-

rectly cause the Catskill Group (or the Tribe) any harm, this theory of liability fails as a matter of law. *See Excel Group, Inc. v. Permis Constr. Corp.*, 254 A.D.2d 451, 452, 678 N.Y.S.2d 778, 778 (2d Dep't 1998) (defendant's improper use of a report in violation of its agreement with a third-party did not make the defendant's interference with plaintiff's business relationship "wrongful").

Two cases upon which the Catskill Group relies—*Sommer v. Kaufman*, 59 A.D.2d 843, 399 N.Y.S.2d 7 (1st Dep't 1977), and *Pagliaccio v. Holborn Corp.*, 289 A.D.2d 85, 734 N.Y.S.2d 148 (1st Dep't 2001)—are inapposite. In both of those cases the defendant's wrongful conduct against third-parties bore a direct nexus to the relationship with which the defendant interfered. *See Sommer*, 59 A.D.2d at 843, 399 N.Y.S.2d at 7-8 (defendants directly injured plaintiff by bribing public official to deny plaintiff a building permit for the subject project); *Pagliaccio*, 289 A.D.2d at 85, 734 N.Y.S.2d at 149 (defendants alleged to have directly injured plaintiff by threatening plaintiff's employer with harm if plaintiff's employment was not terminated). Here, by contrast, the alleged fraud against Melius and Kaufman—which netted an introduction to the Tribe—had at most a tenuous relation to the harm alleged.

2. Alleged Fraud Against the Tribe

The Catskill Group's claim that Park Place also committed fraud against the Tribe when, in the final stages of negotiations, Park Place announced that it could "switch" the limited approval the Catskill Group had obtained to Park Place's site "without any significant loss of time." The district court held that Park Place's assurance (which turned out to be false) was not actionable because it was mere "puffery,"

and the Tribal Chiefs testified that they "did not rely on [Park Place's] corporate braggadoccio." *Catskill III*, 217 F. Supp. 2d at 437.

Although the Catskill Group acknowledges the general principle that statements of opinion generally cannot constitute fraud, *see, e.g.*, *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 220, 413 N.Y.S.2d 135, 140, 385 N.E.2d 1062, 1067 (1978), the Catskill Group relies on the narrow exception to that rule: namely, that opinions "may constitute actionable fraud where a present intent to deceive exists." *Magnaleasing, Inc. v. Staten Island Mall*, 563 F.2d 567, 569 (2d Cir. 1977) (emphasis added); *See also Harsco Corp. v. Segui*, 91 F.3d 337, 346 n.7 (2d Cir. 1996) ("[F]raud liability may attach when a person state[s] that something was to be done when he kn[ows] all the time it was not to be done and that his representations were false." (internal quotation marks omitted)). In particular, the Catskill Group maintains that Park Place made the assurance of timeliness to the Tribe knowing full well that its assurance was false.

The fatal shortcoming of the Catskill Group's theory, however, is the absence of any facts to support it. Clive Cummis—Park Place's former vice-president, who made the alleged assurance—testified that his statement was based upon his then-knowledge of the federal approval process, which was based on advice of counsel. Moreover, the Tribal Chiefs testified in their depositions that they did not rely on Park Place's alleged assurance, and that testimony stands uncontroverted. Absent any evidence that Cummins's statement was motivated by an attempt to deceive, that it did in fact deceive the Tribe, or that Park Place had any knowledge superior to the Tribe's with

respect to the anticipated timing of events beyond either party's control, the district court properly rejected the Catskill Group's allegation of wrongful means against the Tribe.

B. Participation in Kaufman's Breach of Fiduciary Duty to the Tribe

The Catskill Group further contends that Park Place used wrongful means insofar as it knowingly participated in a breach of fiduciary duty owed to the Tribe by Kaufman as the principal of the manager of the Tribe's Akwesasne casino. More specifically, the Catskill Group contends that Kaufman improperly used his position at Akwesasne to "slow" that casino's payroll, in an attempt to put a financial "squeeze" on the Tribe, with the ultimate aim of inducing the Tribe to look to Park Place for a financial bailout. The Catskill Group contends that Kaufman was motivated by the significant fee allegedly promised to him by Park Place in the event that Park Place took over the management contract at Akwesasne and/or entered into a contract with the Tribe for a new casino in the Catskills.

In *Hannex Corp.*, we recognized that the commission of the tort of knowing participation in a breach of fiduciary duty supports a finding of wrongful means. 140 F.3d at 206. The elements of that tort are: (1) a breach by a fiduciary of obligations to another; (2) the defendant's knowing inducement of or participation in the breach; and (3) damages suffered by the plaintiff from the breach. *Id.* at 203. With respect to the second element, "[o]ne participates in a fiduciary's breach if he or she affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables it to proceed." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284

(2d Cir. 1992), *overruled on other grounds by Gerosa v. Savasta & Co.*, 329 F.3d 317, 319 (2d Cir. 2003).

As factual support for its claim that Park Place knowingly participated in Kaufman's alleged breach of duty to the Tribe, the Catskill Group relies almost exclusively on an excerpt from a taped conversation on February 16, 2000 between Kaufman and Cummis:

KAUFMAN: . . . But you got to remember the pressure on them with how we're squeezing them in Akwesasne is huge. I mean they—you know, I have kind of delayed their payrolls and—

CUMMIS: Yeah.

KAUFMAN: —slowed it down so badly that, you know, they're looking at Arthur as the savior [*i.e.*, Arthur Goldberg, Park Place's then-CEO].

CUMMIS: Yep, they are.

KAUFMAN: And it is great. I mean I never would have thought that you would have gotten where you have gotten, but I guess Arthur is a genius.

CUMMIS: He's pretty good. I'm not bad. He's pretty good.

KAUFMAN: You must be a hell of a team.

CUMMIS: Yeah.

KAUFMAN: I mean I have been around a little bit, but not as much as you guys. But to take a situation like this—remember we started with our letter of intent and they said never would they give an exclusive.

CUMMIS: Yeah.

KAUFMAN: But you guys can maneuver. I'm impressed.

CUMMIS: They've given it to us now. Now, we had better get together about the financial situation.

* * *

The Catskill Group contends that reasonable jurors could infer from this conversation that Park Place: (1) devised the alleged scheme to financially squeeze the Tribe; (2) provided advice or encouragement to act; (3) provided financial comfort to Kaufman by offering him money in the event that Park Place took over the management of Akwesasne; and (4) ratified Kaufman's breach by entering into agreements with the Tribe notwithstanding Park Place's knowledge of Kaufman's breach.

The first two contentions warrant little discussion. The tape at most suggests that Park Place knew about Kaufman's plan to financially squeeze the Tribe through payroll slowdown. There is no evidence, however, that Park Place devised the scheme. Moreover, given that the conversation in the tape occurred after the payroll slowdowns, the tape itself cannot be used to demonstrate that Park Place provided advice or encouragement to act.

The Catskill Group's remaining contentions warrant closer scrutiny, however. With respect to their "financial support" theory, the Catskill Group principally relies on *S & K Sales Co. v. Nike, Inc.* 816 F.2d 843 (2d Cir. 1987), in which we held that the defendant had participated in the breach of a third-party's fiduciary duty to his employer, the plaintiff. *Id.* at 850. Although it is fair to assume from the facts of that case that the third-party took comfort in breaching his duty to plaintiff in light of defendants' offer of employment to the third-party, it was not on that basis—and certainly not on that basis alone—that we found the defendant to have knowingly par-

ticipated in the breach of fiduciary duty. Rather, unlike in this case, the evidence in *S & K Sales Co.* was that the defendant directly and concretely participated in the breach of duty by, inter alia, (1) sending misleading letters to the plaintiff on the basis of the third-party fiduciary's request, and (2) authorizing the third-party fiduciary to solicit the plaintiff's employees to work for defendant. *Id.* Thus, even if Park Place had assured Kaufman of financial comfort to induce his alleged breach of duty, we believe that assurance is insufficient, on its own, to establish the participation necessary to support a claim.

Nor is Park Place's alleged ratification of Kaufman's breach sufficient, either alone or in combination with plaintiff's other assertions, to establish wrongful means. The Catskill Group's "ratification" theory is drawn principally from *Diduck*, in which we affirmed the district court's finding that a defendant had participated in a union official's breach of fiduciary duty to an ERISA fund. 974 F.2d at 284. We held that the defendant's continued association with the union official and underpayments to the union, after the defendant was put on notice of the breach, crossed the threshold of tortious participation:

> Once put on notice of the breach, [the defendant] could not continue its association with [the union official] as if his conduct were not questionable. Its failure to inquire into the propriety of that conduct and take appropriate action was a substantial factor facilitating the breach. Making payments that [the defendant] knew or should have known "short-changed" the funds effectively ratified [the union official's] conduct.

Id.

Diduck is distinguishable, however, because the defendants' conduct of, inter alia, making short payments to the ERISA fund proximately caused a portion of the alleged injury. *See id.* In stark contrast, Park Place's dealings with Kaufman after the alleged breach occurred were not a substantial factor causing the Catskill Group any harm.

Moreover, the Catskill Group's claim that Park Place should be accountable simply because it continued associating with Kaufman after, and with knowledge of, his alleged breach cannot be squared with our decision in *S & K Sales Co.* There, we questioned the propriety of a jury instruction that permitted a finding of liability if the defendant "participated in [the third-party's] breach of his duty of loyalty, or that [defendant] knowingly accepted the benefits of [the third-party's] breach of his duty of loyalty." *S & K Sales Co.*, 816 F.2d at 849. It was the instruction's disjunctive "or"—and in particular the "knowing[] accept[ance]" prong of it—that troubled us. Ultimately, we did not in S&K resolve the issue of whether the challenged instruction was legally erroneous, because we found no prejudice to the defendant in light of the charge as a whole, which made clear that liability could attach only if the defendant both participated in the third-party's breach and if the defendant accepted the benefits of the breach. *Id.* at 849-50.

We now hold what we intimated in *S & K Sales Co.*. the knowing acceptance of benefits alone is insufficient to sustain a claim for participating in the breach of a fiduciary duty. *See id.* at 849 ("Nike could not have been prejudiced because the charge as a whole correctly conveyed to the jury the proper standard and emphasized the element of 'participation' as the essence of the claim.").

C. Park Place's Allegedly Improper Economic Pressure

Finally, we reject the Catskill Group's claim that Park Place used wrongful means, in the form of economic pressure, to interfere with the Catskill Group's business relations with the Tribe. In particular, the Catskill Group claims that Park Place sought to capitalize on the Tribe's financial difficulty by agreeing to loan the Tribe $3 million in exchange for a contract giving Park Place exclusive development rights with the Tribe.

In *Carvel Corp.*, the New York Court of Appeals explained that for economic pressure to constitute wrongful means, such pressure must have been for the "sole purpose of inflicting intentional harm on plaintiffs." 3 N.Y.3d at 190, 785 N.Y.S.2d at 362, 818 N.E.2d at 1103 (quoting NBT Bancorp, Inc., 215 A.D.2d at 990, 628 N.Y. S.2d at 408-10). There is no evidence of that here; indeed, the evidence shows that Park Place offered the loan to promote its own legitimate business interests in the gaming industry. As the district court succinctly explained:

> The situation here is relatively simple. The Tribe needed money. Park Place had money. The Tribe asked Park Place for money. Park Place had no obligation to give the Tribe any money. So it bargained with the Tribe. Both parties came to the decision that an exclusive casino development contract was a fair trade for the immediate $3 million loan. That is not improper economic pressure.

Catskill III, 217 F. Supp. 2d at 439. We agree.

Because the Catskill Group has failed to present a triable issue of fact on the required element of wrong-

ful means, we affirm the district court's grant of summary judgment to Park Place dismissing the tortious interference with business relations claim.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgments.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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06 Civ. 6365 (CM), 00 Civ. 8660 (CM)

PAUL DEBARY AND JOSEPH BERNSTEIN, INDIVIDUALLY IN THEIR CAPACITIES AS LITIGATION TRUSTEES OF THE CATSKILL LITIGATION TRUST,
PLAINTIFFS,

AGAINST

HARRAH'S OPERATING COMPANY, INC.,
DEFENDANT.

MONTICELLO RACEWAY DEVELOPMENT COMPANY, LLC,
PLAINTIFF,

AGAINST

PARK PLACE ENTERTAINMENT CORPORATION,
DEFENDANT.

November 20, 2006, Decided

OPINION

JUDGES: Colleen McMahon, U.S.D.J.

OPINION BY: Colleen McMahon

DECISION AND ORDER ON REMAND FROM THE SECOND CIRCUIT, REINSTATING THIS COURT'S PRIOR JUDGMENT GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

McMahon, *J.*:

Catskill Development, L.L.C. ("Catskill"), Mohawk Management, L.L.C. ("Mohawk") and Monticello Raceway Development Co., L.L.C. ("Monticello") (collectively, "Original Plaintiffs"), originally brought this action in diversity against Park Place Entertainment Corp. ("Park Place"), alleging that defendant, one of the world's largest casino companies, wrongfully induced officials of the St. Regis Mohawk Indian Nation ("Tribe") to terminate the Tribe's contractual agreements and business relationships with plaintiffs relating to the development and management of a proposed $500 million Native American casino at the Monticello Raceway in Sullivan County, New York (the "Casino Project"). Plaintiffs sought damages based on defendant's alleged tortious interference with contractual relations, tortious interference with prospective business advantage, unfair competition, and Donnelly Act violations.

Following this court's dismissal of plaintiffs' unfair competition and Donnelly Act claims *in Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001) ("Catskill I") and granting of defendant's motion of summary judgment on the two remaining claims in *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 217 F. Supp. 2d 423 (S.D.N.Y. 2002) ("*Catskill III*"), plaintiffs appealed to the Second Circuit.

The Second Circuit remanded this case so that this court could determine whether federal jurisdiction properly existed if non-diverse parties Catskill and Mohawk were dismissed, whether the remaining plaintiff—Monticello—was a third-party beneficiary to the Land Purchase Agreement, and, if so, whether New York law permitted third-party beneficiaries to

recover damages for defendant's alleged tortious interference with contract.

For the reasons stated below, this court finds that it has subject matter jurisdiction over this case now that the non-diverse parties have been dismissed. While New York law permits recovery by third-party beneficiaries for tortious interference with contract, Monticello is not a third-party beneficiary of the LPA.

This court's prior decision granting defendant summary judgment and dismissing the case in its entirety, is reinstated.

I. The Relevant and Undisputed Facts

The factual background to the dispute between the parties is set forth in greater detail in this court's earlier opinions. *See, e.g., Catskill III*, 217 F. Supp. 2d at 425-28; *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 154 F. Supp. 2d 696, 698-701 (S.D.N.Y. 2001) (*"Catskill II"*); *Catskill I*, 144 F. Supp. 2d at 218-229. This court assumes familiarity with these opinions.

Briefly, the original plaintiffs are entities created by a group of businessmen and developers who, beginning in 1995, sought to build and operate a casino at a site adjacent to the Monticello Racetrack in Monticello, New York. Because gambling activities are illegal in New York State unless conducted on Native American lands, under certain legal conditions, plaintiffs partnered with the Tribe to pursue development of the Casino Project.

On June 3, 1996, original plaintiff Catskill acquired, from entities that are not parties or in any way connected to the Tribe, 230 acres of land that contained the Monticello Raceway. Of the property purchased, 29.31 acres adjacent to the Raceway (the

"Raceway property") were set aside for the Casino Project. Catskill created the other two original plaintiffs, Mohawk and Monticello, to provide various services for the Raceway and the casino; Catskill entered into an agreement with the latter which granted Monticello "the exclusive right to develop, lease and manage" the entire 230 acre tract. (*See Declaration of Sanford I. Weisburst* ("*Weisburst Decl.*"), Ex. T at 1.) Catskill acted for all three entities in seeking the local, state and federal endorsements necessary to build and operate the proposed casino.

On July 31, 1996, the Tribe and plaintiffs entered into five separate agreements: the Land Purchase Agreement (the "LPA"), the Gaming Facility Development and Construction Agreement (the "DCA"), the Gaming Facility Management Agreement (the "Management Agreement"), the Shared Facilities Agreement (the "SFA"), and the Mortgage Agreement.[21]

A. The Land Purchase Agreement

The LPA, which is the focus of this remand, was an agreement between Catskill and the St. Regis Mohawk Gaming Authority (the "Authority"), "an instrumentality of the Tribe, to which it has assigned its authority over the development and conduct of

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[21] On the same day that the Tribe entered into these five agreements, the St. Regis Tribal Council passed a resolution stating that the Tribe "has taken steps to acquire land on which a gaming facility will be developed in Sullivan County, New York," and specifically resolving to "authorize the Chief Executive Officer to execute the Gaming Facility Management Agreement with Mohawk . . . the Development and Construction Agreement with Monticello . . . and all other collateral agreements necessary to further this development." (*Weisburst Decl.*, Ex.Q.)

Gaming . . . on the Property." (*Weisburst Decl.*, Ex. I, Recitals.) The express purpose of the LPA was to convey the Raceway property from Catskill to the United States Government, to be held in trust for the Tribe. The LPA stated that the Tribe intends to "use the Real Estate to improve the economic conditions of its members . . . and directly benefit the Tribe." (*Weisburst Decl.*, Ex. H, Recitals.) In exchange for the trust conveyance, the Tribe agreed to pay Catskill $10 million, which was the price Catskill had paid to the prior owners in order to acquire the entire 230 acre tract. *(Id.* at § 2.02(a).)

Although the primary contractual obligations articulated in Article II of the LPA, entitled "THE TRANSACTION," involved the trust conveyance in exchange for reimbursement of the purchase price explained above, Article II also required the Authority to "perform certain covenants as provided herein." *(Id.* at § 2.02(b).) These covenants, enumerated in Article VIII of the LPA, included the following:

> Section 8.02. BIA Approval. The Authority shall (and shall cause the Tribe to) cooperate with Seller [Catskill] and any of its Affiliates and use Authority's reasonable best efforts in good faith to assist in obtaining the approval of the [Bureau of Indian Affairs ("B.I.A.")] of the Trust Conveyance and any other documents or transactions related thereto. . . .
>
> Section 8.04. Use of Proceeds. The Authority shall use the net proceeds from the sale of the Senior Secured Notes[22] only for the acquisition,

[22] "Senior Secured Notes" was not defined in the LPA, but was defined in the DCA and MA as "the Authority's Series A Senior Secured Notes and Series B Senior Secured Notes, if any, issued by the Authority pursuant to the Indenture." (*Weisburst Decl.*,

> construction, development and operation of the Project. . . .

(*Id.* at §§ 8.02 and 8.04.) § 1.01, in turn, defined an "Affiliate" of any specified person in the LPA as

> any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. . . . "[C]ontrol" . . . shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise. . . .

(*Id.* at § 1.01.)

The LPA also outlined the available remedies in case of contractual default, specifying that if the Authority breached its obligations under the LPA, Catskill's "sole remedy shall be to seek specific performance by [the Authority] of its obligations under this Agreement." (*Id.* at § 12.01.) However, in a later provision, the LPA also stated that the Authority "does hereby waive its sovereign immunity from unconsented suit, whether such suit be brought in law or equity. . . . [The Authority] intends this waiver to be interpreted liberally to permit the full litigation of disputes arising under or out of this Agreement." (*Id.* at § 14.10.)

Finally, the LPA contained an integration clause that stated, "This Agreement contains the entire un-

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Ex. I at § 1.1; Ex. J at § 2.) The "Senior Secured Note Indenture," in turn, was defined as "that certain Indenture, dated as of the Issuance Date, by and among the Authority, the Tribe and the Trustee, pursuant to which the Senior Secured Notes are issued." (*Id.*)

derstanding between the parties with respect to the subject matter hereof." *(Id.* at § 14.03.) Although the "definitions" section of the LPA stated that "'Developer' means Monticello Raceway Development Company, L.L.C." *(Id.* at § 1.01), neither the word "Developer" nor the name "Monticello" appeared again anywhere in the LPA. Similarly, the LPA mentioned the DCA once in its "definitions" section, but never again.

B. The Gaming Facility Development and Construction Agreement

The DCA, meanwhile, was an agreement between the Tribe and Gaming Authority on one side, and Monticello on the other, in which the Tribe granted Monticello the right to plan and to build the casino. In exchange, Monticello was to receive compensation from the Authority and agreed to help the Tribe obtain financing for the construction.

The parties' obligations under the DCA were clearly defined. The DCA set forth the fee to be paid by the Authority to Monticello for its development of the Casino: "As compensation for all of the services to be performed . . . by [Monticello], the Authority agrees to pay to [Monticello] and [Monticello] agrees to accept payment for the performance of its services under this Agreement, a developer's fee . . . equal to five percent . . . of total Project Costs." *(Id.* at § 5.3.) The DCA also contained a clause requiring both Monticello and the Authority "to execute . . . any and all additional instruments . . . and other documents as may be required by the . . . Bureau of Indian Affairs . . . in order to effectuate . . . the respective rights . . . of the parties hereto." *(Id.* at § 8.1.)

The DCA did not mention the LPA except in the "definitions" section. Notably, in defining the LPA,

the DCA made no mention of any third-party beneficiary: the LPA "shall mean that certain Agreement . . . between the Catskill Development, L.L.C. and the Authority, pursuant to which Catskill . . . shall convey the Property to the United States to be held in trust for the benefit of the Tribe." (*Weisburst Decl.*, Ex. I at § 1.1.) The only other hint of the LPA's existence occurred in the DCA Recitals, which noted, "The Tribe is expected to be the beneficial owner of certain land located in the State of New York . . . to be held in trust for the benefit of the Tribe by the United States of America." *(Id.* at Recitals P A.)

Last, like the LPA, the DCA contained an integration clause: "This Agreement, and the Management Agreement . . . constitute the entire agreement among [Monticello, the Authority and the Tribe] with respect to the development, construction and management of the Gaming Facility." *(Id.* at § 8.14) (emphasis added). The LPA was not integrated into the DCA. The DCA further stated, "Neither [Monticello nor the Authority] shall have the power to bind or obligate the other except as set forth in this Agreement." *(Id.* at § 8.4.)

Unlike the LPA, the DCA contained a third-party beneficiary clause, expressly stating that the DCA was not intended to directly benefit anyone other than the parties thereto. *(Id.* at § 8.2.)

C. The Master Amendment

Almost four years after executing the five agreements, on March 22, 2000, the various parties thereto executed a Master Amendment in response to the Secretary of the Interior's request "that the parties explain, clarify, or make certain amendments to the agreements before he makes the two-part determination required by Section 20, 25 U.S.C.

§ 2719(b)(1)(A)."[23] (*Weisburst Decl.*, Ex. U, Recitals.) Specifically, the Master Amendment amended four of the five agreements originally signed by the parties. The Master Amendment's primary purpose was to add a clause to the DCA, SFA, and Management Agreement that prohibited Mohawk and Catskill from "establish[ing], own[ing], operat[ing] or manag[ing] any other gaming facility in Sullivan County (other than the Monticello Raceway) without the written consent of the Authority." (*Id.* at PP 1, 2(I), 3(ii).) The Master Amendment also amended the DCA to include the provision that, "Upon termination of this Agreement, [Monticello] has no ongoing role in the Gaming Facility." (*Id.* at P 2(iv).)

The LPA was the only agreement not amended by the Master Amendment.

D. The Lawsuit

Although plaintiffs and the Tribe began in 1996 to seek the regulatory approvals required to begin the Casino Project, plaintiffs still had not received all the necessary regulatory approval to move forward by April 2000. They had, however, expended millions of dollars toward their goal.

Sometime in late 1999, Park Place principals were introduced to members of the Tribe. On April 14, 2000, the Tribe entered into a written agreement with Park Place that gave Park Place the exclusive

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[23] 25 U.S.C. § 2719(b)(1)(A) permits gaming on land held by the U.S. government in trust for Indian tribes, only if the Secretary of the Interior "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and "if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination."

right to develop and manage any and all St. Regis Mohawk casinos in New York State. The execution of the April 2000 agreement with Park Place effectively terminated the Tribe's partnership with plaintiffs and led to this long-running litigation, in which plaintiffs seek damages from Park Place for interfering with their relationship with the Tribe.

II. Procedural History

A. Catskill I

On November 13, 2000, plaintiffs filed their complaint, alleging four causes of action. This Court granted defendant's motion to dismiss plaintiffs' First Cause of Action (alleging tortious interference with contractual relations) and their Third and Fourth Causes of Action (claiming unfair competition and violation of the Donnelly Act). *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001) (*"Catskill I"*). Plaintiffs' Second Cause of Action, for tortious interference with prospective business advantage, survived defendant's motion to dismiss. In dismissing the First Cause of Action pursuant to Fed. R. Civ. P. 12(b)(6), I held that the Management Agreement was void under 25 U.S.C. § 2711(b) which requires that any management contract be approved by the Chairman of the National Indian Gaming Commission ("NIGC") in order to be an enforceable contract. *Catskill I*, 144 F. Supp. 2d at 232. I then held that the other four agreements between plaintiffs and the Tribe—the LPA, the DCA, the SFA and the Mortgage Agreement—were "collateral" to the Management Agreement within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 § 2711(a)(3), and so were also void because they lacked NIGC approval. *Id.* at 233.

B. Catskill II

Upon Plaintiffs' timely motion for reconsideration, plaintiffs persuaded this court that § 2711(a)(3) applies only to management contracts for Class II gaming. Under the Management Agreement, the Tribe took full responsibility for Class II gaming. Plaintiffs argued that, since the Management Agreement addressed only Class III gaming, the "collateral agreement" rule of Section 2711(a)(3) did not apply to the LPA, the DCA, the SFA or the Mortgage Agreement.

I agreed, concluding that the term "management contract," as used in Section 2710(d)(9) (relating to Class III Gaming), did not include collateral agreements that relate to the gaming activity. I vacated so much of Catskill I as had voided the four collateral agreements in reliance on Section 2711(a)(3). Because I had concluded in *Catskill I* that three of the four collateral agreements—the DCA, the SFA, and the Mortgage Agreement—were invalid on separate grounds, I did not reverse the dismissal of claims relating to them. But since there was no basis other than the "collateral agreement" theory of Section 2711(a)(3) for invalidating the LPA, I reinstated plaintiffs' First Cause of Action for tortious interference with contract, insofar as it related to the LPA. *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 154 F. Supp. 2d 696 (S.D.N.Y. 2001) ("*Catskill II*").

C. Catskill III

Following the Catskill II decision, defendant sought reconsideration of that ruling. Defendant argued that the Eighth Circuit's holding in *United States ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002) rendered the holding in

Catskill II questionable. Defendant simultaneously moved for summary judgment on plaintiffs' First and Second Causes of Action.

After concluding that Casino Magic "neither explains nor fills in the statutory gap identified in Catskill II," this court found what I still believe to be the answer in the Code of Federal Regulations:

> The NIGC's rules, codified at Chapter 25, Title III of the Code of Federal Regulations, require agency review of management contracts for both Class II and Class III gaming. 25 C.F.R. § 533.1. According to these duly-promulgated regulations, a "management contract" is defined as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor. . . ." 25 C.F.R. § 502.15 (emphasis added). A collateral agreement, as defined by the NIGC, is "any contract . . . that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe . . . and a management contractor. . . ." 25 C.F.R. § 502.5. The LPA fits squarely into the NIGC's definition of an agreement collateral to the management agreement. . . . Thus, the NIGC has regulatory authority to review and approve the LPA as a collateral agreement, despite the omission of any reference to Class III management contracts in Section 2711(a)(3), or to Section 2711(a)(3) in Section 2710(d)(9). . .

Catskill Dev., L.L.C. v. Park Place Entm't Corp., 217 F. Supp. 2d 423, 433 (S.D.N.Y. 2002) ("*Catskill III*") (emphasis added).

Because the court had previously found that the LPA fit the NIGC's definition of a collateral agree-

ment to the MA,[24] Catskill III held that the LPA was void for want of NIGC approval. For that reason, I granted Park Place's motion for summary judgment dismissing the First Cause of Action. *Catskill III*, 217 F. Supp. 2d at 433.

In a separate discussion, Catskill III also granted defendant's motion for summary judgment on plaintiffs' sole remaining claim for tortious interference with business advantage. *Id.* at 434-46.

Plaintiffs subsequently asked this court to vacate its decision granting defendant's motion for summary judgment on the tortious interference with business advantage claim, on the ground that defendants had concealed relevant evidence. At the time plaintiffs made their motion, the case was on appeal to the Second Circuit. I asked the Circuit to send the case back for additional discovery, *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 286 F. Supp. 2d 309 (S.D.N.Y. 2003), and it did so. Although I granted plaintiffs' motion pending additional discovery, I ultimately reinstated the order granting defendant's motion for summary judgment and dismissing the complaint in its entirety. *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 345 F. Supp. 2d 360 (S.D.N.Y. 2004). Plaintiffs then reinstated their appeal.

D. The Second Circuit Appeal

On appeal, a jurisdictional defect emerged for the first time. When "plaintiffs filed the complaint, they

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[24] *See Catskill I*, 144 F. Supp. 2d at 233 ("The Land Purchase and Mortgage Agreements effect the transfer and lease of the Raceway property for the purpose of building and operating the casino. Catskill will be paid for this transfer by profits from the casino, which, under the Management Agreement, Catskill will operate.").

were unaware of this Court's decision in *Handelsman v. Bedford Village Associates Limited Partnership*, 213 F.3d 48 (2d Cir.2000), stating that the citizenship of a limited liability corporation is determined by reference to the citizenship of its members." *Catskill Litig. Trust v. Park Place Entm't Corp.*, 169 Fed. Appx. 658, 659 (2d Cir. 2006). As the court noted, under Handelsman, two of the original plaintiffs, Catskill and Mohawk, were not completely diverse from Park Place. Absent complete diversity, federal jurisdiction did not exist under 28 U.S.C. § 1332. *Id.*

Plaintiffs urged the Second Circuit to retain jurisdiction by dismissing the non-diverse plaintiffs pursuant to Fed. R. Civ. P. 21. However, the Second Circuit preferred to remand the case to this court and directed me to determine whether such dismissal would salvage jurisdiction. *Id.* at 660. The Circuit adopted this tactic for several reasons. First, it was "not clear that dismissal of Catskill and Mohawk would cure the jurisdictional defect" because plaintiffs had "made no representation as to the citizenship of Monticello's members when the suit was filed in November 2000." *Id.* In addition, the Circuit thought the district court would be in a better position to determine whether dismissal of Catskill and Mohawk would prejudice any of the parties. *Id.*

The Second Circuit also noted that if Catskill and Mohawk were dismissed from the litigation, then the only remaining plaintiff would be Monticello—a party to only one of the three contracts on which the original tortious interference with contract claim was based, and not a party to the LPA. However, plaintiffs argued that the entire dispute could still be considered by the Circuit, because "Monticello is a third-party beneficiary of the [LPA] signed by Catskill." *Id.*

Because Monticello's status as a "third-party beneficiary of the [LPA] is a fact-intensive inquiry that this Court is ill-equipped to undertake, particularly without the aid of the district court's prior consideration of the issue," remand was deemed appropriate. *Id.*

Finally, the Circuit directed this court to determine whether New York law permits third-party beneficiaries of a contract to recover damages for tortious interference with that contract.

To recap, the Second Circuit remanded this case to answer five separate questions: 1) whether dismissal of Catskill and Mohawk as non-diverse parties would prejudice any of the parties in the litigation; 2) whether diversity jurisdiction existed at the time the action was commenced, if Monticello and Park Place are the only remaining parties; 3) whether Monticello was a third-party beneficiary of the LPA; 4) whether New York law permits a third-party beneficiary of a contract to recover damages for tortious interference with that contract; and 5) whether, in light of all these considerations, this court should reinstate part or all of its prior judgment granting defendant's motion for summary judgment and dismissing the case in its entirety. *Id.* at 660-61.

E. The May 30, 2006 Stipulation

By the time the case returned to this court, none of the original parties was still in existence. Several years after filing the complaint, all three original plaintiffs had assigned their interests in this litigation to an entity known as the Catskill Litigation Trust ("the Trust"). This court had added the Trust as a party plaintiff on February 23, 2004. Meanwhile,

Park Place had been acquired by Harrah's Operating Company, Inc. ("Harrah's").[25]

On May 30, 2006, shortly after the Second Circuit issued its remand order, all parties to this litigation, as well as Paul deBary and Joseph Bernstein, as Litigation Trustees of Catskill Litigation Trust (the "Litigation Trustees"), and Harrah's, stipulated, *inter alia*, to the following:

> Plaintiffs and Defendant, agreeing that the prerequisites to dismissal of non-diverse plaintiffs Catskill and Mohawk are satisfied, will promptly join in requesting that the District Court enter an order dismissing Catskill and Mohawk without prejudice. While the Trust's citizenship is irrelevant to determining the existence of diversity since it was added as a Plaintiff after the filing of the original complaint, the parties will request that it too be dismissed without prejudice. Each of the to-be-dismissed plaintiffs in turn agrees that . . . it will be bound by the decisions and judgments entered in this case.

(*See Weisburst Decl.*, Ex. B P 3) (internal citations omitted).

The stipulation further provided that, once this court dismissed Catskill, Mohawk and the Trust, Paul deBary and Joseph Bernstein would file suit in their own names as Litigation Trustees against Harrah's, in the Southern District of New York. (*Id.* at P 5.) The Litigation Trustees agreed that prior rulings in the original lawsuit would be binding on them in

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[25] Park Place changed its name to Caesar's Entertainment, Inc. and subsequently merged into Harrah's effective June 13, 2005. Harrah's owns the assets that belonged to Caesar's Entertainment prior to the merger. (*See Weisburst Decl.*, Ex. B P 2.)

this subsequent lawsuit. *(Id.* at P 7.) In turn, Harrah's agreed not to interpose any objections to the appropriateness of this action, including objections based on subject matter jurisdiction, personal jurisdiction, improper venue, *res judicata*, or statute of limitations *(Id.* at P 6.), and both parties would request that this court consolidate this new lawsuit with Case No. 00-CV-8660, pursuant to Fed. R. Civ. P. 42(a), and enter a final judgment in the consolidated action based upon the prior decisions in Case No. 00-CV-8660. *(Id.* at PP 8-9.)

F. The June 12, 2006 Order

On June 12, 2006, I signed an order dismissing Catskill, Mohawk, and the Trust from this action without prejudice. June 12, 2006 Order. In reaching this decision, I found that the parties remaining in the action—plaintiff Monticello and defendant Park Place—were completely diverse at the time the complaint was originally filed: Monticello was a citizen of New York, Connecticut and Illinois and Park Place was a citizen of New Jersey and Delaware. (*See Weisburst Decl.*, Exs. C-D; *See also id.*, Ex. E at P 11a.) This finding of diversity accords with the Second Circuit's decision in *Handelsman v. Bedford Village Assocs. Ltd. P'ship*, which held that the citizenship of a limited liability corporation is determined by reference to the citizenship of its members. 213 F.3d 48, 51-52 (2d Cir. 2000).[26]

I further found that the Fed. R. Civ. P. 21 prerequisites to such a dismissal were satisfied. First, I

[26] In addition, the plaintiffs in the consolidated action, Paul deBary and Joseph Bernstein, are domiciled in Connecticut and Florida, respectively, and are therefore completely diverse from Harrah's, a Delaware corporation with a principal place of business in Nevada. (*See Weisburst Decl.*, Ex. B P 6, Exs. F-G.)

concluded that Catskill and Mohawk were dispensable parties given that complete relief could be accorded between the remaining parties, and because any judgment against Monticello in this action would have preclusive effect against Catskill and Mohawk. (*See* Pl. Mem. of Law at 3.) Also, the May 30, 2006 Stipulation, to which attorneys for Catskill, Mohawk, Monticello, the Trust, the Litigation Trustees, Park Place and Harrah's were signatories, provided sufficient evidence that no party to this litigation would "suffer prejudice by virtue of the dismissal." *Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 832, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989). (*See also* Pl. Mem. of Law at 3-4 for explanation of why none of the parties felt prejudiced by May 30, 2006 Stipulation.)

G. Consolidation of the Two Actions

Subsequent to this Court's order, the plaintiff Litigation Trustees filed their complaint on August 22, 2006. Case No. 06-CV-6365. On October 6, 2006, after deciding that the two cases involve "common question[s] of law [and] fact," I ordered Case No. 06-CV-6365 and Case No. 00-CV-8660 to be consolidated pursuant to Fed. R. Civ. P. 42(a). Defendant Harrah's joined the litigation shortly after, filing its Answer on October 25, 2006.

The Stipulation and the above-described orders dispensed of the jurisdictional problem. I now turn to the rest of the Second Circuit's questions.

III. Discussion

A. Standard of Review

This case has been remanded by the Second Circuit from an appeal of this court's decision granting de-

fendant's motion for summary judgment on claims for tortious interference with contract and tortious interference with business advantage. Therefore, in determining whether Monticello is a third-party beneficiary of the LPA, this court views the record in the light most favorable to the plaintiffs and resolves all ambiguities and draws all reasonable inferences against the defendant. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*,, 834 F.2d 54, 57 (2d Cir. 1987).

B. Monticello is Not a Third-Party Beneficiary to the LPA [27]

1. Whether Monticello is a Third-Party Beneficiary is a Question of Fact Properly Addressed by this Court

Before addressing the substance of plaintiffs' claim that Monticello is a third-party beneficiary to the LPA, two procedural issues warrant comment.

First, I concur with plaintiffs' statement that third-party beneficiary status is a question of fact, because the issue turns on whether the contracting parties intended their agreement to directly benefit a third-

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[27] Although the Second Circuit asked this court to consider only whether Monticello is a third-party beneficiary to the LPA, plaintiffs suggests that "judicial economy favors addressing Mohawk as well because the inquiry is so similar and because it will have to be undertaken if the Second Circuit holds valid the LPA but not the [Management Agreement]." (Pl. Mem. of Law at 8 n.5.) While I agree that an inquiry regarding Monticello's third-party beneficiary status is essentially identical to an analysis of Mohawk's status, Mohawk has been dismissed from this case as a non-diverse party. Therefore any inquiry into its rights under the LPA would violate the case or controversy rule.

party. (Pl. Reply Mem. of Law at 2.) Determining intent is necessarily a factual endeavor. *See Oost-Lievense v. N. Am. Consortium, P.C.*, 969 F. Supp. 874, 879 (S.D.N.Y. 1997).

However, I disagree with plaintiffs' suggestion that the only way to resolve that issue of fact is by trial. (Pl. Reply Mem. of Law at 2.) The parties' intent can and should be gleaned from the four corners of the resulting contract; indeed, the primary purpose of reducing an agreement to writing is to fully and completely state the parties intentions regarding their transaction. Only if the contract is ambiguous on its face would courts consider parol evidence. *Finch, Pruyn & Co., Inc. v. M. Wilson Control Servs.*, 239 A.D.2d 814, 658 N.Y.S.2d 496, 499 (3d Dep't 1997). Because I conclude that the LPA is not ambiguous, there is no disputed issue of fact to resolve at a trial.

2. Plaintiffs are Not Judicially Estopped from Claiming that Monticello is a Third-Party Beneficiary to the LPA

Defendant suggests in its opening brief that plaintiffs are judicially estopped from claiming third-party beneficiary status for Monticello because plaintiffs argued the following in a 2001 brief requesting this court to reconsider its dismissal order in *Catskill I*: "Catskill, Mohawk and Monticello were to be separately compensated for their property or services under their respective agreements . . . . Neither Catskill, Mohawk nor Monticello had any rights or obligations or were to receive compensation under more than one of these agreements." (Declaration of George F. Carpinello ("Carpinello Decl."), Ex. A at 5) (emphasis in original.)

As defendant conceded in its reply brief (Def. Reply Mem. at 2), that argument fails. A party may be ju-

dicially estopped "from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding" provided the party actually "argued an inconsistent factual position in a prior proceeding" and "the prior inconsistent position [was] adopted in some manner by the court in the earlier proceeding." *Mademoiselle Knitwear, Inc. v. Liz Claiborne, Inc.*, No. 98 CV 3252, 1999 U.S. Dist. LEXIS 8592, 1999 WL 377853, at *9 (S.D.N.Y. June 9, 1999). Catskill's earlier argument was made in the current proceeding, and that argument did not ultimately prevail. Thus, Catskill is not estopped from claiming that Monticello is a third-party beneficiary to the LPA.

As to defendant's assertion that plaintiffs' current posture "is disingenuous since it is flatly inconsistent with the strenuous arguments made by its co-plaintiff in previous filings to this Court" (Def. Reply Mem. at 2), I would note only that, since there is no judicial estoppel, plaintiffs are free to make any argument they like.

3. New York Law Permits a Third-Party Beneficiary to Recover Damages for Tortious Interference with Contract

As discussed below, Monticello is not a third-party beneficiary to the LPA and cannot recover for tortious interference with the LPA in any event. However, it bears noting that New York state courts have long held that third-party beneficiaries of a contract may bring a claim for tortious interference with that contract. *See, e.g., Associated Flour Haulers & Warehousemen, Inc. v. Hoffman*, 282 N.Y. 173, 181, 26 N.E.2d 7 (N.Y. 1940) (dismissing claim for tortious interferences where plaintiff failed "to qualify itself either as a party to or a third party beneficiary of"

the contract at issue); *Sage Group Assocs. v. Dominion Textile*, 244 A.D.2d 281, 665 N.Y.S.2d 407, 408 (1st Dep't 1997) ("The broker's cause of action against the landlord for tortious interference with contract was properly dismissed on the ground that the broker was neither a party to nor an intended beneficiary of the sublease rejected by the landlord"); *Scheckter v. Emigrant Sav. Bank*, 237 A.D.2d 273, 654 N.Y.S.2d 162, 163 (2d Dep't 1997) (affirming dismissal of tortious interference claim in part because plaintiff was not a third-party beneficiary of the contract); *Burba v. Rochester Gas & Elec. Corp.*, 90 A.D.2d 984, 456 N.Y.S.2d 578, 580 (4th Dep't 1982) (rejecting defendant's principal contention . . . that the complaint [for tortious interference with contract] fails to allege that defendant has breached any contract to which the male plaintiffs were parties," reasoning that plaintiffs "have alleged that they were third-party beneficiaries of" the contracts at issue); *See also* 72 N.Y. JUR. 2D INTERFERENCE § 17 ("As a general rule, one may not maintain an action for inducing breach of contract unless he or she is a party to the contract or a third-party beneficiary thereunder") (citing *Hoffman*, 282 N.Y. at 181).

Federal district courts applying New York law have reached the same conclusion. *See, e.g., Am Online Latino v. Am. Online, Inc.*, 250 F. Supp. 2d 351, 363 n.65 (S.D.N.Y. 2003) ("Plaintiff may not sue for inducing breach of such a contract unless he is its third party beneficiary."); *Arista Records, Inc. v. MP3Board, Inc.*, No. 00-CV-4660, 2002 U.S. Dist. LEXIS 16165, 2002 WL 1997918, at *16 (S.D.N.Y. Aug. 29, 2002) (denying defendant's motion for summary judgment on plaintiff's claim for tortious interference with contract even though plaintiff was not a party to the contract because "there is evidence that

the contract or a later modification of it was made expressly for [plaintiff's] benefit" such that plaintiff "could enforce [the contract] as a third party beneficiary"); *Wells Fargo Bank Northwest, N.A. v. Energy Ammonia Transp. Corp.*, No. 01-CV-5861, 2002 U.S. Dist. LEXIS 10912, 2002 WL 1343757, at *1 (S.D.N.Y. June 18, 2002) ("Since . . . defendants are neither parties to, nor third-party beneficiaries of [the contract] they lack standing to bring a claim for tortious interference with that contract.").

4. Monticello is Not an Intended Third-Party Beneficiary of the LPA

Turning to the substance of plaintiffs' claim, it is evident from the face of the LPA itself that Monticello is not a third-party beneficiary to that contract.

Under New York law, in order to recover as a third-party beneficiary of a contract, a claimant must establish that the parties to the contract intended to confer a benefit on the third party. *Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 124 (2d Cir. 2005). The New York Court of Appeals has declared Restatement (2d) of Contracts § 302 to be an accurate statement of New York third-party-beneficiary law. *Id.* (citing *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 485 N.E.2d 208, 495 N.Y.S.2d 1 (N.Y. 1985). Under section 302(1):

> Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

A contractual requirement that the promisor render performance directly to the third party shows an intent to benefit the third party. *See Levin v. Tiber Holding Corp.*, 277 F.3d 243, 249 (2d Cir. 2002) (finding an intended third-party beneficiary where the third-party was a direct beneficiary of the promisor's promise and where performance of the promisor's obligations was rendered directly to the third-party).

This court recognizes, "There is considerable dispute concerning whether it is appropriate to consider extrinsic evidence" regarding third-party beneficiary status. *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp. 2d 157, 164 (S.D.N.Y. 1998); compare *Subaru Distribs. Corp.*, 425 F.3d at 124 ("'A court in determining the parties' intention should consider the circumstances surrounding the transaction as well as the actual language of the contract.'") (quoting Restatement (2d) of Contracts § 302, Reporter's Note, comment a) with *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 663 (2d Cir. 1996) ("'Although a third party need not be specifically mentioned in the contact before third-party beneficiary status is found, New York law requires that the parties' intent to benefit a third party must be shown on the face of the agreement.'") (quoting *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 725 F. Supp. 712, 733 (S.D.N.Y. 1989).

This court, relying on Newman & Schwartz (which has not, to my knowledge, been overruled), concludes that the parties' intention "to benefit the third party must appear from the four corners of the instrument.

The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions." *Travelers Indem. Co. of Conn. v. Losco Group, Inc.*, 150 F. Supp. 2d 556, 561 (S.D.N.Y. 2001); *See also Onanuga v. Pfizer, Inc.*, No. 03-CV-5405, 2003 U.S. Dist. LEXIS 20298, 2003 WL 22670842, at *5 (S.D.N.Y. Nov. 7, 2003) ("the intention to benefit a third party must be found within the four corners of the contract"); *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp. 2d 157, 163 (S.D.N.Y. 1998) ("the parties' intention to benefit the third party nonetheless must be revealed on the face of the agreement.") (internal quotations and citations omitted).

Furthermore, in order for a contract to confer enforceable third-party beneficiary rights, "it must appear 'that no one other than the third party can recover if the promisor breaches the contract' or the contract language should otherwise clearly evidence 'an intent to permit enforcement by the third party.'" *Artwear, Inc. v. Hughes*, 202 A.D.2d 76, 615 N.Y.S.2d 689, 692 (quoting Fourth Ocean Putnam Corp., 66 N.Y.2d at 45); *See also Subaru Distribs. Corp.*, 425 F.3d at 124-25.

Plaintiffs claim that Monticello is an intended third-party beneficiary of the LPA for five reasons. All of them lack merit.

First, plaintiffs argue that the parties' intent to confer a benefit directly on Monticello is evident from the Authority's promise to "cooperate with Seller and any of its Affiliates and use Authority's reasonable best efforts in good faith to assist in obtaining the approval of the B.I.A of the Trust Conveyance and any other documents or transactions related thereto." (*Weisburst Decl.*, Ex. H at § 8.02.) Plaintiffs argue

that this covenant requires the Authority to "render performance directly to Monticello," because Monticello is an affiliate of Catskill. (Pl. Mem. of Law at 10.)

Even assuming arguendo that Monticello were an affiliate of Catskill, plaintiffs' assertion that the § 8.02 covenant renders Monticello a third-party beneficiary is incorrect. As a matter of common sense, the LPA is quite simply a contract for the conveyance of land. This purpose is evident from the LPA's recitals, which state that the "Seller intends to convey certain land . . . to the United States of America to be held in trust for the benefit of the . . . Tribe . . . . [and] the Tribe desires to use the [land] to improve the economic conditions of its members . . . . and . . . the Authority shall pay the purchase price." (*Weisburst Decl.*, Ex. H, Recitals.) The recitals make no mention of the Authority's obligation to cooperate with Catskill's affiliates.

This contractual objective is echoed in Article II of the LPA, entitled "THE TRANSACTION." Article II states that Catskill will convey 29 acres of land to the United States—to be held in trust for the St. Regis Mohawk Tribe—and that the Authority will pay $10 million for this land. (*Weisburst Decl.*, Ex. H at Art. II.) In addition to detailing the trust conveyance and purchase price, Article II states that "Purchaser has agreed to perform certain covenants as provided herein." (*Weisburst Decl.*, Ex. H at § 2.02(b).) But the very fact that these covenants are not even mentioned in the LPA's recitals or explicitly detailed in the "TRANSACTION" section, further signals their ancillary nature. Notwithstanding § 14.06's boilerplate assertion to the contrary, it is entirely appropriate for this court to interpret the obligations con-

tained in the recitals and Article II as the principal purpose of the contract. *See Subaru Distribs. Corp.*, 425 F.3d at 125 (relying in part on "the recital of the purpose of the agreement" in determining whether plaintiff was an intended third-party beneficiary of the contract).

Thus, even if § 8.02 required the Authority to specifically cooperate with Monticello in obtaining BIA approval—which it does not—such cooperation is clearly incidental to the overall import of the LPA and does not confer a direct benefit on Monticello under the LPA. *See Piccoli A/S*, 19 F. Supp. 2d at 163 (holding "Cooperation Clause" in contract was not "sufficient to show that the [contract] . . . clearly evidences an intent to permit enforcement by [plaintiff]) (internal quotations and citations omitted).

Next, plaintiffs argue that the parties' intent to confer a benefit directly on Monticello is clear from the Authority's promise to "use the net proceeds from the sale of the Senior Secured Notes only for the acquisition, construction, development, and operation of the Project and any other use permitted under the Senior Secured Note Indenture." (*Weisburst Decl.*, Ex. H at § 8.04.) Plaintiffs contend that reading this provision in conjunction with the LPA's designation of Monticello as the "Developer" (*Id.* at § 1.01) necessitates a finding that the Authority "must use the funds in part to pay Monticello." (Pl. Mem. of Law at 10.) Except for its reliance on *Levin*, Plaintiffs cite no law to support its proposition that using the proceeds from the sale of notes (detailed in a separate contract) to pay for the construction, development and operation of a casino (also detailed in separate contracts), renders Monticello a third-party beneficiary under the LPA.

Unfortunately for plaintiffs, the contract at issue in Levin is nothing like the LPA. In *Levin*, a holding corporation that owned a reinsurance company contracted to sell the reinsurer to another company. The contract explicitly required the holding corporation to "maintain [the reinsurer's] capital and surplus at no less than $125,000 over a five-year period" and "to pay [the reinsurer's] legal fees and expenses in [the reinsurer's then] existing litigation until December 3, 2005." *Levin*, 277 F.3d at 246-47. In holding the reinsurer to be a third-party beneficiary to the contract, the court found that the contract "specifically included [the reinsurer] as a direct beneficiary of [the holding corporation's] promise" and that the holding corporation "rendered performance of its obligations directly to [the reinsurer]." *Id.* at 249.

Plaintiffs' reliance on *Levin* apparently derives from the fact that the *Levin* contract contemplates the sale of a company (to which a promise to a third-party reinsurer is inextricably bound) and the LPA is a land sale (to which a promise to Monticello is allegedly inextricably bound). But that is where the similarities end. The Levin contract specifically identifies the third-party by name and outlines the precise payment term—including amounts and duration—related to this promise. By contrast, § 8.04 of the LPA neither contemplates any specific benefit for Monticello, nor states the terms for such benefit. Indeed, the plaintiffs' own argument—that the Authority must use the proceeds "in part" to pay Monticello and that "[t]he DCA further explains" how the Authority should make such payments (Pl. Mem. of Law at 10)—demonstrates the incidental nature of this provision. § 8.04 requires the Authority to pay unnamed entities an unknown sum for an unknown duration for undescribed work. The LPA lacks these

specifics because they are contained in a separate contract—the DCA—to which Monticello is a party. No separate contracts existed between the reinsurer and the holding company in *Levin*.

Nor does this alleged basis for third-party beneficiary status resemble the more typical scenario in which the underlying contract exists so that performance can be rendered directly to third-parties. *See, e.g., Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 597, 600 (2d Cir. 1991) (holding plaintiff client was third-party beneficiary to contract between his stock broker and brokerage firm, under which brokerage firm provided clearing services for broker's clients, including "register[ing] the securities in [plaintiff's] name and . . . ship[ping] the securities to the [plaintiff]" and "sen[ding] periodic activity statements to [plaintiff]"); *Finch*, 658 N.Y.S.2d at 497-98 (holding plaintiff manufacturer who hired electrician to perform services at plaintiff's power plant was third-party beneficiary to subcontract between electrician and mason, because "subcontract necessarily required [mason] to "directly perform services at plaintiff's facility . . . in order to satisfy . . . obligations to plaintiff."). The Authority manifestly signed the LPA to "improve the economic conditions of [the Tribe's] members," not to directly confer any benefit on Monticello.

Moreover, to the extent that any benefits may have accrued to Monticello under §§ 8.02 and 8.04 of the LPA, such benefits were clearly incidental to the LPA's primary goal of conveying land to the U.S. government for the Tribe's benefit. *See Mademoiselle Knitwear*, 1999 U.S. Dist. LEXIS 8592, 1999 WL 377853, at *10. In *Mademoiselle Knitwear*, the court held that the plaintiff sweater manufacturer was an

incidental beneficiary of contracts between the sweater retailer and the union representing the retailer's apparel workers. The contracts at issue required the retailer to "order from the plaintiff" an average of 1.4 million sweaters per year, to be "produced by" plaintiff's recently unionized employees; simultaneously, the retailer entered into an oral contract with the manufacturer requiring the retailer to order an average of 1.4 million sweaters per year from plaintiff. 1999 U.S. Dist. LEXIS 8592, [WL] at *1-2. The court held that "[t]o the extent that the . . . agreements may have guaranteed the plaintiff certain levels of production—and perhaps profits—[plaintiff] was no more than an incidental beneficiary of these agreements and has no ability to enforce them." 1999 U.S. Dist. LEXIS 8592, [WL] at *1-2. Similarly, the benefits allegedly accruing to Monticello under the LPA are actually granted to Monticello via the DCA, a contract to which Monticello is a party. Therefore, to the extent that benefits to Monticello are contemplated by the LPA, they are incidental to the LPA's overall purpose. *See also McPheeters v. McGinn, Smith & Co., Inc.*, 953 F.2d 771, 773 (2d Cir. 1991) "A third-party beneficiary exists, however, only if the parties to that contract intended to confer a benefit on him when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to him.") (internal quotations and citations omitted).

Third, plaintiffs contend that Monticello should be deemed a third-party beneficiary to the LPA because of "the LPA's frequent mention of Monticello." (Pl. Mem. of Law at 15.) Putting aside the fact that plaintiffs' brief cites six examples of this "frequent mention" and only one of these six cites actually mentions either "Monticello" or "Developer" (*Weisburst Decl.*,

Ex. H at § 1.01), this argument is still unpersuasive. If the LPA specifically mentioned Monticello by name one hundred times, that alone would not constitute sufficient evidence that parties to the LPA intended for Monticello to be a third-party beneficiary. Cases relied on by plaintiffs do not hold otherwise. For example, in *National Westminster Bank PLC v. Grant Prideco, Inc.*, the fact that plaintiff was specifically mentioned in the contract was merely one factor that weighed in favor of finding plaintiff to be a third-party beneficiary. Far more persuasive was the contract's "provision specifying [that] payment" be made "directly to [plaintiff]" 261 F. Supp. 2d 265, 268, 274 (S.D.N.Y. 2003); *See also Septembertide Pub., B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 677-80 (2d Cir. 1989) (holding author was third-party beneficiary of contract between publisher and sublicensee of publishing rights, where publisher paid author two-thirds of all sublicensing income derived from contract—pursuant to separate agreement—and contract referred to author and his work). In every case cited by plaintiffs, the decisive factor is not whether or how often the contract mentions a third-party,[28] but whether the contract clearly grants some benefit or performance directly to the third-party.

Fourth, plaintiffs assert that Monticello is a third-party beneficiary to the LPA because the LPA's sovereign immunity waiver provision "plainly contemplates suits by entities other than Catskill against

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[28] Indeed, many courts have recognized that a contract need not specifically name a third-party at all in order to directly benefit a third-party. *See, e.g., Piccoli A/S*, 19 F. Supp. 2d at 163 ("a 'party need not necessarily be specifically mentioned in a contract to be considered a third-party beneficiary'") (quoting *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 663 (2d Cir.1996)).

the Authority for money damages." (Pl. Mem. of Law at 17.) Plaintiffs argue that § 14.10's broad immunity waiver which permits the Authority to be sued "in law or equity" must mean that entities other than Catskill can sue the Authority for breaching the LPA, because § 12.01 explicitly states that the only remedy available to Catskill against the Authority is specific performance. (*Weisburst Decl.*, Ex. H at §§ 12.01, 14.10.) According to plaintiffs, § 14.10 clearly contemplates suit, not just by any entity, but by Monticello in particular, given its "frequent mention earlier in the LPA as well as the benefits [it] stood to receive upon the LPA's closing." (Pl. Mem. of Law at 17.)

Neither plaintiffs nor defendant cites any cases that address a similar argument, and this court has been unable to find a case in which dual remedial clauses were deemed evidence that the contracting parties intended to grant some benefit to a third-party. I am, however, convinced that the LPA's remedial provisions do not evince such intent. While § 12.01 makes clear that Catskill may only seek specific performance in the event of the Authority's breach, the leaps of contractual interpretation that plaintiffs then urge this court to make are simply too vast to support a finding that the LPA parties clearly intended to benefit Monticello. Nowhere in §§ 12.01 or 14.10 is either Monticello or the "Developer" actually mentioned, nor do §§ 8.02 and 8.04 confer such obvious benefits on Monticello that the LPA parties "clearly . . . inten[ded] to permit enforcement [of the LPA]" by Monticello.[29] *Artwear, Inc.*, 615 N.Y.S.2d at 692 (internal quotations and citations omitted).

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[29] A more accurate reading of these two provisions appears to be that § 12.01 mandates specific performance as the only remedy available to Catskill for the Authority's breach and—given

Finally, plaintiffs contend that the circumstances surrounding the execution of the LPA, including the "interrelationship between the LPA," the DCA and the Management Agreement, "overwhelmingly support the conclusion that the parties to the LPA intended to benefit Monticello." (Pl. Mem. of Law at 18.) But as previously noted, the parties' intention "to benefit the third party must appear from the four corners of the instrument. The terms contained in the contract must clearly evince an intention to benefit the third person who seeks the protection of the contractual provisions." *Travelers Indem. Co. of Conn.*, 150 F. Supp. 2d at 561. This court will not consider surrounding circumstances when—as here—the intent of the parties is clear on the face of the contract. Aside from containing no provisions that clearly confer any benefit directly on Monticello, the LPA also contains an integration clause that states, "This Agreement contains the entire understanding between the parties with respect to the subject matter hereof." (*Weisburst Decl.*, Ex. H at § 14.03.) It does not say "This Agreement and several other agreements concerning what will happen to the property in the future contain the entire understanding." The LPA stands on its own: the land conveyance is its own separate transaction. Therefore, this court finds that the LPA clearly evidences no intent to benefit Monticello.

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that § 12.01 contains no sovereign immunity waiver itself—§ 14.10 provides the necessary (and boilerplate) waiver so that Catskill can in fact seek § 12.01's prescribed remedy. Whether such an interpretation is accurate, or whether these two LPA remedial provisions are—as plaintiffs and defendant respectively assert—collaborative or conflicting, is irrelevant to the instant question. The bottom line is that neither provision contemplates Monticello as a potential claimant.

Even if this court were to consider circumstances surrounding execution of the LPA, including the interrelationship between these three separate contracts, such interrelationship would not be sufficient to confer third-party beneficiary rights on Monticello in the LPA contract. The DCA's own integration clause—which explicitly defines the limits of Monticello's rights in the Casino Project—ersuades this court that Monticello's third-party beneficiary status in the LPA should not hinge on agreements outside of the LPA:

> This [DCA] Agreement, and the Management Agreement, together with the exhibits thereto, constitute the entire agreement among Developer [Monticello], Authority and the Tribe . . . with respect to the development, construction and management of the Gaming Facility and supersedes all written or oral agreements, understandings, representations and negotiations and correspondence between the parties. This Agreement shall not be supplemented, amended or modified by any course of dealing, course of performance or uses or trade and may only be amended or modified by a written instrument duly executed by officers of the parties hereto.

(*Weisburst Decl.*, Ex. I at § 8.14) (emphasis added). The DCA's integration clause does not "integrate" the LPA into Monticello's deal, while it does integrate the Management Agreement (a separate contract). This integration clause, coupled with the LPA's equally strong provision, gainsays any attempt by plaintiffs to locate third-party beneficiary rights for Monticello in the LPA.

Moreover, if the existence of the DCA and Management Agreement signals anything to this court, it

is that the LPA most certainly did not intend to confer third-party beneficiary rights on Monticello, because Monticello's rights were clearly defined elsewhere. *See 4 Hour Wireless v. Smith*, No. 01-CV-9133, 2002 U.S. Dist. LEXIS 22680, 2002 WL 31654963, at *1 (S.D.N.Y. Nov. 22, 2002) ("The conclusion that Calypso was not an intended third-party beneficiary of the AT & T/4 Hour contract is buttressed by Calypso's own agreement with 4 Hour"); *See also Subaru Distribs. Corp.*, 425 F.3d at 126 (holding that plaintiff sub-distributor lacked third-party beneficiary status under agreement between car manufacturer and car distributor granting distributor exclusive rights in U.S., where plaintiff entered later contract with distributor granting plaintiff sub-distribution rights in New York, contract referenced earlier agreement, but manufacturer was not party to later contract; contract's mere "reference to" agreement "does nothing to establish that the earlier agreement was made for the benefit of [plaintiff]").

The pre-LPA relationship between Catskill and Monticello does not alter this outcome. On December 1, 1995, Catskill and Monticello entered an agreement wherein Catskill granted Monticello the exclusive right to develop Catskill's 230 acre parcel of land at the Monticello Raceway, including the 29 acre tract that later became the subject of the LPA. (*Weisburst Decl.*, Ex. T at 1, 3.) Plaintiffs contend that "[h]aving decided to transfer this 29 acre tract, Catskill had to procure the Tribe/Authority's agreement (consummated in the DCA) to use Monticello as the exclusive developer of the land . . . or else Catskill would be in breach of its 1995 agreement with Monticello. Accordingly, it follows that Catskill and the Tribe/Authority, in signing the LPA, intended to benefit Monticello." (Pl. Mem. of Law at 20.)

It most certainly does not. Nowhere in the 1995 agreement does Catskill promise Monticello anything but the exclusive right to develop a 230 acre parcel of land. The 1995 agreement does not mention any duty on the part of Catskill to procure a tribe's agreement to use Monticello as the exclusive developer of the casino; at most, the 1995 agreement suggests potential agreements to come, stating, "That portion of the Property on which the casino will be constructed may be conveyed to the [U.S.] to be held in trust for an Indian Nation which may operate a Class II and Class III gaming facility."[30] (*Weisburst Decl.*, Ex. T at 1) (emphasis added.) Even if the 1995 agreement could be construed as requiring Catskill to obtain such an agreement—which is a stretch—the 1995 agreement surely did not require Catskill to convey a 29 acre portion of the 230 acre tract to the U.S. government, to be held in trust for an Indian Nation to be named later. Thus, the 1995 agreement stood apart from the LPA, DCA and Management Agreement; Monticello still maintains the exclusive right to develop the 230 acre parcel of land and the enforceability of the other three agreements in no way affects this right.

Similarly, the execution of the Master's Amendment does not provide external evidence that the LPA was intended to directly benefit Monticello. The Master Amendment was executed because "the Secretary [of the Interior] has requested that the parties explain, clarify or make certain amendments to the agreements before he makes the two-part determina-

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[30] To the extent that the 1995 agreement may have required Catskill to procure a later agreement between the Tribe and Monticello, that duty was clearly fulfilled—as plaintiffs concede—by execution of the DCA, not the LPA.

tion required by Section 20, 25 U.S.C. § 2719(b)(1)(A)." (*Weisburst Decl.*, Ex. S at 1.) Essentially, the Master Amendment modifies the DCA, SFA, and Management Agreement by requiring Mohawk and Catskill to abstain from operating any other gaming facilities in Sullivan County without the Authority's written consent.[31] (*Id.*) As plaintiffs concede, not a single amendment in the Master Amendment affects the LPA; in fact, the Master Amendment does not mention the LPA at all. Moreover, although Monticello clearly "impaired [its] interests under the . . . DCA . . . in the Master Amendment" (Pl. Mem. of Law at 20), it does not follow that Monticello did so because of the "intended benefits under the LPA that . . . Monticello stood to receive." (Pl. Mem. of Law at 19-20.) Monticello agreed to the Master Amendment because doing so was the only way to appease the Secretary, receive the necessary regulatory approval for the Casino Project, and—hopefully—receive benefits specifically earmarked for Monticello in the DCA.

C. This Court's Earlier Judgments are Reinstated

In *Catskill III*, I dismissed plaintiffs' tortious interference with contract claim on the basis that the LPA had not received NIGC approval and was therefore void. Monticello's status as a third-party beneficiary

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[31] The Master Amendment also contains amendments to the SFA and the Mortgage Agreement. Thus, Plaintiffs' suggestion that Catskill's signature on the Master Amendment (even though the LPA was not amended) demonstrates that the Master Amendment was intended to touch on the LPA, misses the mark. (Pl. Mem. of Law at 19.) Catskill is a party to the SFA, which the Master Amendment does amend. (*Weisburst Decl.*, Ex. S at P 3.)

has no bearing on that prior decision. Therefore, this court's earlier decision granting defendant's motion for summary judgment of plaintiff's claims for tortious interference with contract and tortious interference with business advantage, is reinstated with the additional finding that Monticello is not a third-party beneficiary to the LPA.

IV. Conclusion

In response to the questions posed by the Second Circuit's remand order, this court finds that federal jurisdiction is proper over the instant consolidated action, Monticello is not a third-party beneficiary to the LPA, and New York law permits third-party beneficiaries to recover damages for tortious interference with a contract. In light of the foregoing, this court reinstates its previous judgment granting defendant's motion for summary judgment of claims for tortious interference with contract and tortious interference with business advantage.

Dated: November 20, 2006

Colleen McMahon U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 8660 (CM)(GAY)

CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., AND MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C.,
Plaintiffs,

v.

PARK PLACE ENTERTAINMENT CORP.,
Defendant.

August 22, 2002, Decided

JUDGES: Colleen McMahon, U.S.D.J.

OPINION BY: Colleen McMahon

OPINION MEMORANDUM AND DECISION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AS MOOT

Plaintiffs Catskill Development, L.L.C. ("Catskill"), Mohawk Management, L.L.C. ("Mohawk") and Monticello Raceway Development Co., L.L.C. ("Monticello") (collectively, "Plaintiffs" or the "Catskill Group"), bring this action in diversity against Park Place Entertainment Corp. ("Park Place"), claiming tortious interference with contractual relations and tortious interference with prospective business rela-

tionships.[32] Plaintiffs allege that Defendant, one of the world's largest casino companies, wrongfully induced officials of the St. Regis Mohawk Nation to terminate the Mohawks' contractual agreements and business relationships with Plaintiffs relating to the development and management of a proposed $500 million Native American casino at the Monticello Raceway in Sullivan County, New York (the "Casino Project").

The case is before me on Defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. Defendant also moves for reconsideration of this Court's decision of July 23, 2001, pursuant to Fed. R. Civ. P. 54(b) and Local Rule 6.3. For the reasons below, I grant Defendant's motion for summary judgment. The motion for reconsideration is denied as moot.

FACTS PERTINENT TO THIS MOTION

The background to the dispute between the parties is set forth in this Court's earlier opinions. *See Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001) ("Catskill I"), vacated in part, 154 F. Supp. 2d 696 (S.D.N.Y. 2001) ("*Catskill II*"). Familiarity with these opinions is assumed.

To recapitulate briefly: Plaintiffs are members of a group of businessmen and developers who, beginning in 1995, sought to build and operate a casino at a site adjacent to the Monticello Racetrack in Monticello,

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[32] Plaintiffs' claims of unfair competition, and violations of the Donnelly Act, N.Y. Gen. Bus. Law § 340 were dismissed by this Court in *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001), *vacated in part*, 154 F. Supp. 2d 696 (S.D.N.Y. 2001).

New York. Because gambling is illegal in New York State unless on Native American lands and under certain legal conditions, the Catskill Group became partners with the St. Regis Mohawk Tribe (hereinafter the "Tribe" or the "Mohawks") on the casino project.

On June 3, 1996, Catskill (one of the Plaintiffs) acquired 230 acres of land that contained the Monticello Raceway. Of the property purchased, 29.31 acres adjacent to the Raceway were set aside for a casino. Catskill created the other two corporate Plaintiffs to provide various services for the Raceway and the casino. Catskill acted for all three entities in seeking the necessary local, state and federal approvals needed to build and operate the proposed casino.

On July 31, 1996, the Tribe (through its Tribal Council) and Plaintiffs entered into five separate agreements. One of these agreements was a Land Purchase Agreement (the "LPA") between the Regis Mohawk Gaming Authority (the "Gaming Authority") and Catskill. The LPA contemplated the transfer of the Raceway property from Catskill to the United States government to be held in trust for the Mohawks, in exchange for which the Mohawks would pay Catskill $10 million, which was the purchase price of the entire Monticello Raceway property. The other agreements were a Mortgage Agreement, a Gaming Facility Management Agreement, a Shared Facilities Agreement and a Development and Construction Agreement.

In 1996, Plaintiffs and the Tribe began to seek the approvals necessary to begin developing the casino. By April of 2000, Plaintiffs had not yet received all the proper approvals necessary to move forward with

the casino project with the Tribe. They had, however, expended millions of dollars toward their goal.

At the same time, extensive internal warfare over tribal governance fractured the Tribe. Historically, the St. Regis Mohawk Tribe was governed by a Three Chiefs system, under which the Three Chiefs, elected by Tribe Members, acted as the Tribe's governing body. In 1995, the Tribe commenced a referendum election to determine whether it would adopt a Tribal Constitution, creating three branches of tribal government, including a Tribal Court. The terms of the Constitution provided for its own adoption upon certification if 51% of the present and voting tribal members voted in favor of its adoption. *See Park Place Entm't v. Arquette*, 113 F. Supp. 2d 322 (N.D.N.Y. 2000). The Tribal Clerk allegedly certified that 50.935093% of those voting were in favor of adopting the Constitution, yet certified that the Constitution was adopted by the requisite vote. *Id.* at 322-23. In June 1996 the Tribal Council rescinded certification of the Constitution following a second referendum. At the end of June, in a third referendum, the Tribe allegedly voted to elect Alma Ransom, Hilda Smoke and Paul Thompson in a "clean slate" of Chiefs, rather than retain the current Tribal Council officials. However, not all of the Tribe accepted the results of this referendum.

Sometime after mid-1999, Park Place principals were introduced to members of the Tribe. On April 14, 2000, the Tribe, through the Three "clean slate" Chiefs, entered into a written agreement with Park Place that made Park Place the exclusive developer and manager of any Mohawk casinos in New York State. *Catskill I*, 144 F. Supp. 2d at 227.

This catapulted the intra-tribal dispute into court. On April 26, 2000, independent representatives of the Mohawk Tribe (including prior chiefs), filed a class action complaint in the St. Regis Mohawk Tribal Court against Park Place, Arthur Goldberg and Clive Cummis (principals of Park Place), and the Three Chiefs who had signed the April 2000 agreement. They asked the Court to nullify the agreement and sought billions of dollars in damages. In response, the Three Chiefs declared the Tribal Court invalid, raided the Court facilities, and removed the Court's computers and files. (Compl. at 116.)

On June 2, 2000, Park Place brought suit in the Northern District of New York seeking: (1) an injunction against the Tribal Court proceeding and (2) a declaration that the Tribal Court was invalid and without authority to adjudicate the claims asserted. On September 18, 2000, Judge McAvoy dismissed Park Place's action for lack of subject matter jurisdiction. *Park Place Entm't Corp.*, 113 F. Supp. 2d at 323 (noting that "significantly, the dispute does not involve a question of the limits of the Tribal Court's jurisdiction, but rather a question of whether the Tribal Court is a valid Tribal authority.") Park Place's appeal to the Second Circuit has been *sub judice* throughout the life of this proceeding.

On March 20, 2001, the Mohawk Tribal Court entered a default judgment against Park Place and the other defendants in the case filed before it, awarding plaintiffs $1.782 billion in actual damages and $5 million in punitive damages. The Tribal Court's opinion contains findings of fact and conclusions of law regarding the validity of various contracts and the actions of Park Place and Catskill. *See Arquette v. Park Place Entm't Corp.*, Case No. 00C10133GN,

Mar. 20, 2001 (St. Regis Mohawk Tribal Court, Hogansberg, NY). Park Place has advised the Court that it views this judgment as a nullity. For reasons discussed in *Catskill I*, Defendant is not collaterally estopped from arguing the validity of these contracts because of the findings of the Tribal Court. *Catskill I*, 144 F. Supp. 2d at 230-31.

THE CASE AT BAR

Whatever the situation among the various tribal factions, the signing of the April 2000 agreement with Park Place effectively terminated the Tribe's partnership with plaintiffs. They seek damages from Park Place for interfering with their relationship with the St. Regis Mohawks.

Plaintiffs claim that the reason their casino project was never approved is because they were "sabotaged by defendant's efforts to scuttle the . . . casino project." *Catskill I*, 144 F. Supp. 2d at 226. Defendant claims that the Tribe signed with Park Place because it offered the Tribe a better deal than Plaintiffs did at a time when there was no enforceable (*i.e.*, fully approved) contract between plaintiffs and the Tribe. Defendant also alleges that no Park Place principals ever attempted to wrongfully sabotage Plaintiffs' partnership with the Tribe. Furthermore, Defendant claims that the relationship between the three Chiefs of the Tribe—Alma Ransom, Hilda Smoke and Paul Thompson—and Plaintiffs was so strained by April 2000 that the Tribe, through the Chiefs, would have signed a deal with Park Place in the absence of any of the alleged wrongful conduct by Park Place.

In *Catskill I*, this Court dismissed Plaintiffs' First Cause of Action (alleging tortious interference with contractual relations) and their Third and Fourth

Causes of Action (claiming unfair competition and violation of the Donnelly Act). Plaintiffs' Second Cause of Action, for tortious interference with prospective business relations, survived the motion to dismiss. Upon Plaintiffs' timely motion for reconsideration, I reinstated so much of Plaintiffs' First Cause of Action as related to tortious interference with one of the four agreements pled in that claim—the so-called Land Purchase Agreement, or "LPA." (*Catskill II*)

Defendant now moves for reconsideration of *Catskill II*, and urges the Court to reinstate its original ruling, which dismissed the First Cause of Action in its entirety. Defendant argues that a recent decision by the Eighth Circuit Court of Appeals, *United States v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002), renders the holding in *Catskill II* questionable. Plaintiffs argue that Defendant's motion is untimely, and also that the Eighth Circuit's decision does not compel a reconsideration of *Catskill II*. Park Place also moves for summary judgment dismissing the First Cause of Action on the merits.

Defendant also moves for summary judgment on plaintiffs' Second Cause of Action. Park Place argues that the claim for tortious interference with contractual relations must be dismissed because (1) Plaintiffs can produce no admissible evidence of any wrongful conduct on the part of Park Place, (2) Plaintiffs cannot show that any statements or actions were the "but for" cause of the Tribe's decision to sign an agreement with Park Place, and (3) Plaintiffs' claims for lost profits are entirely speculative and cannot be proven as a matter of law. Plaintiffs oppose this motion.

DISCUSSION

I. The Holding in *Catskill II* Is Erroneous; Therefore Defendant is Entitled to Summary Judgment Dismissing the First Cause of Action

A. The Motion for Reconsideration

On June 18, 2002, Park Place moved for reconsideration of this Court's decision of July 23, 2001, that held that the LPA, although collateral to the Amended and Restated Gaming Facility Management Agreement (hereinafter the "Management Agreement"), was not subject to review by the National Indian Gaming Commission (NIGC) pursuant to 25 U.S.C. § 2711 (a)(3), because that section does not apply to agreements collateral to management contracts that relate solely to Class III gaming. *See Catskill Development, LLC v. Park Place Entertainment Corp.* ("*Catskill II*"), 154 F. Supp. 2d 696, 702-03 (S.D.N.Y. 2001). Because I had held that the LPA was not independently subject to review by either the NIGC or the Bureau of Indian Affairs (BIA), I held that the LPA was a valid and binding agreement, upon which Plaintiffs could base their claim of tortious interference with contract.

Park Place seeks reconsideration of *Catskill II* because, on its reading, Casino Magic holds that collateral agreements in Class III gaming are, in fact, subject to NIGC review, and also holds that such agreements, whether or not denominated "management agreements," are subject to agency review if they affect the management of the proposed casino. *Id.*

Plaintiffs claim that the motion for reconsideration is untimely. In the event that the court revisits the issue, plaintiffs claim that Casino Magic does not support reversal of this Court's earlier decision.

Plaintiffs are correct that Park Place's motion for reconsideration is untimely. However, Park Place is equally correct that [HN1] a court has inherent power to correct an interlocutory ruling at any time prior to the entry of final judgment. Fed. R. Civ. P. 54(b); *Richman v. W.L. Gore & Assoc., Inc.*, 988 F. Supp. 753, 755 (S.D.N.Y. 1997) (citing *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 134-35 (2d Cir. 1956)); *Algie v. RCA Global Communication, Inc.*, 891 F. Supp. 875, 882 (S.D.N.Y. 1994). In general, a court will reconsider a prior decision in the same case if there has been an intervening change in controlling law, there is new evidence, or a need is shown to correct a clear error or to prevent manifest injustice. *See United States v. Sanchez*, 35 F.3d 673, 677 (2d Cir. 1994), *cert denied*, 514 U.S. 1038, 115 S. Ct. 1404, 131 L. Ed. 2d 291 (1995); Richman, 988 F. Supp. at 755. The decision to grant or deny the motion for reconsideration is within the sound discretion of the district court, especially when there has been no appellate review of the prior decision. *Mina Investment Holdings, Ltd. v. Lefkowitz*, 184 F.R.D. 245, 250 (S.D.N.Y. 1999).

I am at present considering a defense motion for summary judgment dismissing the First Cause of Action. The issue raised by Park Place is material to the decision on that motion. Thus, while the untimely motion for reconsideration can be denied on a technicality, the issue must be addressed before I can grant or deny summary judgment. In that context, I turn to them.

On the merits, Park Place is correct, though not for the reason it suggests.

B. The Holding in *Catskill II*

To understand the reason why Catskill II must be vacated, one first needs to understand what it held.

In *Catskill I*, I held that the Management Agreement was void under 25 U.S.C. § 2711(b) which requires that any management contract have the approval of the Chairman of the National Indian Gaming Commission (NIGC) in order to be an enforceable contract. *Catskill I*, 144 F. Supp. 2d at 232. I then held that the other agreements between plaintiffs and the Tribe—the LPA, the Shared Facilities Agreement and the Development and Construction Agreement (DCA)—were "collateral" to the Gaming Facility Management Agreement within the meaning of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711(a)(3). *Id.*, at 233. That section includes collateral agreements executed in conjunction with management contracts as part of the underlying management contract. This meant that the collateral agreements were also void because they lacked NIGC approval. *Catskill I*, 144 F. Supp. 2d at 233. Alternatively, I held that all of the side agreements except the LPA were independently invalid because they had not been approved by the BIA pursuant to 25 U.S.C. § 81. *Id.*, at 234.[33] Because all of the contracts

[33] At the time Catskill I was decided, I was unaware that the NIGC had already ruled that the Development and Construction Agreement (DCA) was part and parcel of the Management Agreement, and thus monies paid by the Tribe to plaintiffs under that agreement were subject to the statutory cap on management fees to non-Tribal entities. *See* Ex. E to Park Place's Motion for Reconsideration of This Court's Decision of July 23, 2001, Letter from the NIGC to the Tribal Chiefs, the Management Board of the St. Regis Mohawk Gaming Authority, Mohawk Management, LLC and Alpha Hospitality Corp., "Issues" attachment, dated April 19, 2000 (Limiting its review to the

on which Plaintiffs based their tortious interference with contractual relations claim were void and unenforceable for one reason or another, I dismissed the First Cause of Action pursuant to Fed. R. Civ. P. 12(b)(6). *Id.* at 234-35.

Plaintiffs timely requested reconsideration, arguing that 25 U.S.C. § 2711(a)(3), by its literal terms, applies only to management contracts for Class II gaming.[34] Under the Management Agreement between Plaintiffs and the Tribe, the Tribe took full responsibility for Class II gaming. Plaintiffs argued that since the Management Agreement addressed only Class III gaming, the "collateral agreement" rule of Section 2711 (a)(3) did not apply to the LPA, the

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Management Contract and the Development and Construction Agreement, "the NIGC has determined that the [Management] Contract and DCA [Development and Construction Agreement] together are management contracts and are subject to NIGC approval"). Thus, there was no need for me to spend time considering that question in *Catskill I*. Park Place does not appear to have been aware of this ruling at any time during the *Catskill I-Catskill II* debate. Plaintiffs, however, were fully aware of it. They have yet to explain why the court was not apprised of the agency's ruling.

[34] There are three categories of gaming as defined by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701-2721 (1988). Class I gaming, which includes social games and traditional forms of Indian gaming connected to tribal ceremonies, is under the exclusive jurisdiction of Native American tribes. 25 U.S.C. §§ 2703(6), 2719(a)(1). Class II gaming, as defined by IGRA, includes bingo and other games similar to bingo, and is regulated by the NIGC. All other gaming activity (including both electronic gaming devices and traditional casino games, such as card tables, craps, roulette and slot machines) is Class III gaming.

Shared Facilities Agreement or the Development and Construction Agreement.[35]

In Catskill II, I held that agreements collateral to management contracts were not subject to the voiding provisions of IGRA where the management agreement related to a Class III gaming contract, rather than a Class II gaming contract. *Catskill II*, 154 F. Supp. 2d at 703. In so doing, I adopted the literalist view of the statute championed by plaintiffs. Section 2711 of IGRA relates to management agreements. Subsection (a) of that statute is captioned "Class II gaming activity; information on operators." Paragraph (1) of Subsection (a) is explicitly limited to "a management contract for the operation and management of a class II gaming activity." Paragraph (3) of Subsection (a), the provision that integrates collateral agreements into management contracts, provides: "For the purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity." (Emphasis added). Thus, Section 2711(a)(3) by its terms appears limited to contracts relating to Class II gaming activity.

Section 2710(d) of IGRA—which discusses the regulation of Class III Gaming—authorizes the NIGC to review management contracts for Class III Gaming operations. Section 2710(d)(9) incorporates a number of Section 2711's provisions—all of which relate specifically to Class II Gaming—into the review process for Class III management contracts. However, Section 2711(a)(3) is not one of the provi-

[35] Given the NIGC ruling discussed in Footnote 2 above, this argument, at least insofar as it applied to the DCA, was nothing short of astonishing.

sions incorporated by reference into Section 2710(d)(9). No other section of the IGRA contained any analogous provision applicable to Class III management contracts.

For this reason, I concluded that—the term "management contract," as used in Section 2710(d)(9) (relating to Class III Gaming), did not include collateral agreements that relate to the gaming activity. I vacated that portion of my earlier decision that had voided the four collateral agreements in reliance on Section 2711(a)(3). Because I had concluded in *Catskill I* that three of the four collateral agreements were invalid on other grounds, I did not reverse the dismissal of claims relating to them. However, since there was no basis other than the "collateral agreement" theory of Section 2711(a)(3) for invalidating the LPA, I reinstated the First Cause of Action insofar as it related to the LPA.

C. The Casino Magic Decision

Recently, the Eighth Circuit handed down a case in which it concluded that two agreements—a consulting agreement and a construction and loan agreement—that were not themselves management agreements were, when taken together, a management agreement requiring NIGC approval. Park Place contends that this case—*United States v. Casino Magic Corp.*, 293 F.3d 419, 425 (8th Cir. 2002)—compels reversal of the decision in *Catskill II*.

In *Casino Magic*, the United States and its relator brought a *qui tam* action under IGRA against a casino manager over a series of agreements between the Sisseton-Washington Sioux Tribe (hereinafter the "SWS Tribe") and the casino manager. In July 1994, the SWS Tribe entered into a management agree-

ment with Casino Magic in order to build and operate a casino on Indian trust land in North Dakota. The agreement was created in accordance with IGRA and the SWS Tribe and Casino Magic submitted the agreement to the NIGC for approval. In September 1994, after finalizing the terms of the management agreement, the SWS Tribe and Casino Magic entered into a Secured Loan Agreement under which Casino Magic agreed to loan up to $5 million to the SWS Tribe so that it could begin building the casino.

For reasons not clarified in the opinion or the record, the Management Agreement that had been submitted to the NIGC was never approved. Therefore, in March 1996, the parties entered into a Consulting Agreement under which Casino Magic would be a consultant, and not a manager, in order to assist the SWS Tribe in developing and operating the Class III gaming. *United States v. Casino Magic Corp.*, 2001 U.S. Dist. LEXIS 24009, Civ. 98-1033 (D.S.D. Apr. 23, 2001). Under the Consulting Agreement, Casino Magic would develop and identify market plans, provide an accounting system, security plans, job descriptions and develop a long-term master plan for the casino. The parties submitted the Consulting Agreement to the NIGC for approval and was informed by the NIGC that no approval was necessary because the agreement was not a management agreement.

In June 1996, the BNC National Bank of Bismark, North Dakota (BNC) entered into a Construction and Term Loan Agreement under which BNC would make advances to the SWS Tribe in the aggregate amount of $17.5 million, conditioned upon Casino Magic's commitment to contribute to the loan up to $5 million. Later that month, BNC and Casino Magic

entered into a Participation Agreement to formalize Casino Magic's consent to contribute to the SWS Tribe's financing for the casino. The parties submitted the Construction and Term Loan Agreement to the BIA for § 81 approval, but did not submit the agreement to the NIGC.

On January 15, 1998, Casino Magic asked the Tribe for payment of its consulting fee. Instead, the Tribe terminated the Consulting Agreement. It then submitted the Consulting Agreement and the Construction and Term Loan Agreement to the NIGC for joint review. The NIGC found that "the Consulting Agreement and related documents, when considered as a whole, are management contracts," that required the approval of the Chairman of the NIGC. The SWS Tribe replaced Casino Magic with another consulting company.

Plaintiff brought a *qui tam* action claiming that prior payments to Casino Magic totaling almost $7 million violated 25 U.S.C. § 81, 18 U.S.C. § 438 and 25 U.S.C. § 2711, and seeking return of those funds. The district court disagreed, for four separate reasons, none of which is pertinent here.

Plaintiff appealed to the Eighth Circuit, and the United States joined its relator on the appeal. On June 7 of this year, the Court of Appeals reversed and ruled that the two agreements, taken together, were indeed a management agreement, because the Construction and Term Loan limited the tribe's powers vis a vis its consultant, Casino Magic. In so holding, the court relied very heavily on the NIGC's opinion that the two documents, read together, created a management agreement requiring NIGC approval.

In the course of its ruling, the Eighth Circuit did indeed appear to apply Section 2711(a)(3) to Class III gaming agreements. It stated, "A management contract includes the principal contract and "all collateral agreements to such contract that relate to the gaming activity." *Casino Magic*, 293 F.3d at 425 (quoting § 2711(a)(3)). However, the Court of Appeals did not parse the language of Section 2710 and 2711 and find the statutory gap that was analyzed in *Catksill II*; it simply assumed that the Section 2711 standard applied to Class III as well as Class II gaming.

More important, the Eighth Circuit's reference to Section 2711(a)(3) was wholly unnecessary, because neither that court nor the NIGC (on whose prior decision it relied) had before it any agreement that was "collateral" to a "management contract." Indeed, in Casino Management, there was no management contract to which anything could be collateral.[36] Rather, the NIGC decided that the Consulting Agreement and the Construction and Loan Agreement constituted a management contract within the meaning of IGRA when they were read together. Neither of those agreements was itself a management contract—indeed, the NIGC had already ruled that the Consulting Agreement, read alone, was NOT a management contract—and neither of them was collateral to any third agreement that purported to be a management contract. Thus, in the most

[36] To be more precise, the management agreement into which the parties originally entered had not received NIGC approval and was long since abandoned. It did not figure in either the NIGC's or the Eighth Circuit's decision.

technical sense, Section 2711(a)(3) was irrelevant to the NIGC's original decision.[37]

So if Casino Magic neither explains nor fills in the statutory gap identified in Catskill II, how can I conclude that the LPA requires NIGC approval in order to be a valid and binding contract?

D. The Code of Federal Regulations

The answer resides in a resource that all parties—myself included—have overlooked until now: the Code of Federal Regulations.

The NIGC has undoubted power to review Class III Gaming management contracts—Section 2710(d)(9) of IGRA says so. Moreover, in IGRA, Congress expressly ceded to the NIGC authority to make rules applicable to the review of all management contracts. 25 U.S.C. § 2706(b)(10)("The Commission . . . shall promulgate regulations and guidelines as it deems appropriate to implement the provisions of this chapter."). The CFR contains the rules for review of all management contracts with recognized tribes, whether for Class I, II or II gaming.

In Section 2710(d)(9), Congress ordered the NIGC to include in its rules for reviewing Class III gaming

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[37] Ultimately, the Eighth Circuit in Casino Magic did no more than defer to the NIGC's determination that it had plenary review power over these agreements and that the two agreements taken together created a management agreement. Ordinarily this is an appropriate course of action, since the decisions of administrative agencies about matters within their peculiar expertise are entitled to great deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *London v. Polishook*, 189 F.3d 196, 199-200 (2d Cir. 1999). It does not appear that anyone challenged the NIGC's review power in Casino Magic, as plaintiffs do here.

management agreements certain statutory provisions applicable to Class II management agreements. Section 2711(a)(3), as noted in *Catskill II*, was not one of the provisions that Congress ordered the NIGC to apply to Class III gaming agreements. But Congress did not prohibit the NIGC from including the Section 2711 (a)(3) standard in its regulations for Class III management contract review; it simply did not compel the agency to do so. The NIGC was perfectly free to conclude that the definition of Class II Gaming "management contracts" ought to apply to Class III Gaming contracts as well.

That is precisely what happened. The NIGC's rules, codified at Chapter 25, Title III of the Code of Federal Regulations, require agency review of management contracts for both Class II and Class III gaming. 25 C.F.R. § 533.1. According to these duly-promulgated regulations, a "management contract" is defined as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15 (emphasis added). A collateral agreement, as defined by the NIGC, is "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5. The LPA fits squarely into the NIGC's definition of an agreement collateral to the management agreement. I so found in *Catskill I*; I did not reverse myself on that point in *Catskill II*, and I *See* no reason to do so today.

Thus, the NIGC has regulatory authority to review and approve the LPA as a collateral agreement, despite the omission of any reference to Class III management contracts in Section 2711(a)(3), or to Section 2711(a)(3) in Section 2710(d)(9). In the regulatory context, Plaintiffs appear to have conceded as much, since they submitted the LPA to the agency for review and engaged in a lively debate with the NIGC over whether the LPA was itself part and parcel of the Management Agreement—an issue that was never finally resolved at the agency level. *See* Ex. E to the Motion for Reconsideration. At no point in this correspondence did Catskill object to NIGC review of the LPA on the ground that the agency lacked statutory authority to review agreements collateral to Class III management contracts.

So I was right—albeit for the wrong reason—in *Catskill I*, and wrong in *Catskill II*. Because it had not yet received NIGC approval, the LPA, like the other three collateral agreements as well, was void and of no effect. Therefore, Park Place is entitled to summary judgment dismissing the First Cause of Action.[38]

Resolution of this issue allows me to proceed to the merits of Park Place's motion for summary judgment on the one remaining claim for relief—which must be granted

II. Defendant's Motion for Summary Judgment Dismissing the Second Cause of Action

A. Summary Judgment Standard

A party is entitled to summary judgment when there is no "genuine issue of material fact" and the

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[38] The other three collateral agreements are also void for lack of NICG approval, as I originally held in *Catskill I*. To the extent *Catskill II* holds otherwise, it is vacated.

undisputed facts warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56 (c), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In addressing a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Whether any disputed issue of fact exists is for the Court to determine. *Balderman v. United States Veterans Admin.*, 870 F.2d 57, 60 (2d Cir. 1989). The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once such a showing has been made, the non-moving party must present "specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The party opposing summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude summary judgment." *Anderson, supra.*, 477 U.S. at 248.

B. Tortious Interference with Prospective Business Relations

A defendant is liable for tortious interference with a plaintiff's prospective business relations when four conditions are met: (1) there is a business relationship between the plaintiff and a third party; (2) the

defendant, knowing of that relationship, intentionally interferes with it; (3) the defendant acts with the sole purpose of harming the plaintiff, or, failing that level of malice, uses dishonest, unfair, or improper means; and (4) the relationship is injured. *Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 108 (2d Cir. 1997). A valid contract is not necessary in order to state a claim for tortious interference with prospective business relations *See Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 205 (2d Cir. 1998). "[A] plaintiff can recover if that plaintiff can prove that the Defendant tortiously interfered with 'a continuing business or other customary relationship not amounting to a formal contract.'" *Id.* (quoting Restatement (Second) of Torts § 766B (1979)).

In its previous decision, this Court found that Plaintiffs had a business relationship with the St. Regis Mohawks in their joint exploration of a major casino gambling opportunity. *Catskill I*, 144 F. Supp. 2d at 235. Defendant's knowledge of that relationship is also indisputable. *Id.* The issues here are two: (1) whether plaintiffs have met the "sole purpose or malice" requirement, and (2) whether the relationship between the Tribe and Plaintiffs was in fact injured by Park Place's actions.

1. Plaintiffs Can Not Prove Wrongful Means

If the defendant's interference is intended, at least in part, to advance its own competing business interests (as is true of Park Place here), a claim for tortious interference with prospective business relations (as opposed to tortious interference with an existing contract) fails unless Plaintiffs can show that Park Place acted with malice. Malice is established by showing that the defendant used wrongful means to advance its interests. Wrongful means include

"physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *See NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc.*, 87 N.Y.2d 614, 621, 664 N.E.2d 492, 496, 641 N.Y.S.2d 581, 585 (1996). Persuasion alone, although knowingly directed at interference with the relationship, is not sufficient. *Guard Life Corp. v. S. Parker Hardware Manf. Corp.*, 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980); *Phlo Corp. v. Stevens*, 2001 U.S. Dist. LEXIS 7350, 2001 WL 630491, at 7 (S.D.N.Y. June 7, 2001)

a. There Is No Evidence That Park Place Made Fraudulent or Otherwise Wrongful Comments about the Governor, Plaintiffs' Ability to Secure Financing, or about Plaintiffs' Principals

In *Catskill I*, this Court found that the tortious interference with prospective business relations claim withstood Defendant's motion to dismiss because Plaintiffs had sufficiently alleged that "Park Place principals lied about Catskill and the status of the pending regulatory approval to induce the Mohawks to break their agreement with Catskill." *Catskill*, 144 F. Supp. 2d at 236. Defendant now argues that there is no evidence in the record that Park Place ever made any of the alleged misrepresentations mentioned in the complaint, which are as follows:

1. That the Governor of the State of New York would not approve Plaintiffs' project without Park Places's involvement. Complaint at PP 97, 101.

2. That the Plaintiffs and their principals were "unsuitable." Complaint at P 103.

3. That, even if the casino project were approved, Plaintiffs could not arrange financing. Complaint at P 104.

4. That Park Place maligned the reputations and integrity of the principals and their ability to develop, finance and operate the casino project.

Defendants are correct. There is no admissible evidence in the record that Park Place ever made any statements to the Tribe about the Governor's failure to approve the project without Park Place's involvement, that Plaintiffs could not arrange financing even if the casino project were approved, or that Park Place otherwise maligned the reputations and integrity of Plaintiffs' principals. The Mohawk Chiefs, the purported recipients of these statements, all testified that Park Place made no derogatory statements about the Plaintiffs to them or in their presence. *See* Deposition Transcript of Chief Alma Ransom at 360 (hereinafter the "Ransom Dep."); Deposition Transcript of Chief Hilda Smoke at 219 (hereinafter the "Smoke Dep."); Deposition Transcript of Chief Paul Thompson at 184-85 (hereinafter the "Thompson Dep."). The Chiefs also testified that Park Place made no representations that the NIGC would find Plaintiffs unsuitable. Ransom Dep. at 86-88; Smoke Dep. at 219; Thompson Dep. at 234. In fact, the Chiefs testified that any adverse information they had procured relating to the Plaintiffs and their questionable history in the casino industry came from NIGC officials, *See* Ransom Dep. at 69-80, 169, 320-21; Smoke Dep. at 206-15; Thompson Dep. at 78, 80-85, the Oneida Indian Tribe, *See* Ransom Dep. at 318-19, and from the Mohawks' own research, *See* Ransom Dep. at 320; Smoke Dep. at 214-19; Thompson Dep. at 235-36, 274, 303.

Clive Cummis is the former Executive Vice President of Park Place and Arthur Goldberg was the former CEO of Park Place. Mr. Goldberg died before he could be deposed. Cummis testified that he never made any statements about the necessity of Park Place's involvement in order to receive the Governor's approval, and that he never heard the late Mr. Goldberg make such statements. Deposition Transcript of Clive Cummis at 421-22, 504-05 (hereinafter the "Cummis Dep.").

Cummis also testified that Goldberg only advised the Chiefs of Park Place's experience, its financial wherewithal, its ability to finance any project that might be built and its history in the gaming business. Cummis Dep. at 518-19. Cummis does admit to making one statement to the Chiefs that could be construed as a derogatory comment: he told Tribal officials that, in his experience, if an application for a gaming license had not been approved after four years, it was likely not to win approval. Cummis Dep. at 468-69. This is not a malicious statement about Plaintiffs' abilities; as a matter of law, this must be characterized as a statement of opinion, not of material fact. The Tribe was capable of weighing the credibility of this statement for themselves. *See, e.g., Union Car Advertising Co. v. Collier*, 263 N.Y. 386, 399, 189 N.E. 463, 469 (1934); *Elghanian v. Harvey*, 249 A.D.2d 206, 206, 671 N.Y.S.2d 266, 266 (1st Dep't 1998).

Plaintiffs do not challenge Defendant's contention that the record does not support the allegations of Paragraph 103 of the Complaint. In fact, Plaintiffs have explicitly abandoned reliance on the so-called "suitability" representations mentioned in that paragraph of their pleading. In their July 10, 2002 *Reply*

Memorandum in Support of Motion in Limine Regarding Inadmissibility of Alleged Bad Acts or Bad Character (hereinafter the "In Limine Reply"), Plaintiffs, in opposing the admission of any evidence of their suitability for the casino project, state "that they would not rely on proof of any derogatory and/or fraudulent statements regarding suitability made by Park Place to establish the 'wrongfulness' element of their tortious interference claims." *Id.* at 2. Plaintiffs also do not directly challenge Park Place's argument that there is no evidence of the other alleged derogatory statements listed above.

Plaintiffs argue instead that Park Place made certain misstatements to the Tribe that do not directly relate to Plaintiffs, such as that the State of New York was going to shut down the Tribe's Akwesasne Casino for unpaid revenue-sharing fees, Complaint at P 101, that the federal land-into-trust approval for the Monticello Casino was "portable," Complaint at P 102, that a casino project at Park Place' site would be approved within four months rather than the usual three to four years, and that the Tribe's agreements with the Plaintiffs were not validly authorized or properly executed by the Tribe, Complaint at P 104.

There is no evidence in the record that any representative of Park Place ever represented to the Tribe that the State of New York was about to shut down the Akwesasne Casino for any reason. In fact, the Chiefs testified that their own tribal gaming commission had warned them that the Akwesasne casino was in trouble. Ransom Dep. at 148; Smoke Dep. at 327-328. In addition, it is a fact that the Akwesasne casino owed approximately $3 million to the State of New York and the State made a demand for these monies on April 7, 2000. *Carpinello Decl.*, Ex. 4.

There is no question that the Chiefs were fully aware of this debt and of the possible consequences of their failure to pay it.

Clive Cummis did advise the Chiefs that it was his belief that, because the Tribe had received initial approval from the Bureau of Indian Affairs ("BIA") for development of a casino on the Monticello Raceway site, federal approval for the proposed casino could come in four months. Cummis Dep. at 420-21. This was a statement of opinion about future action, however, which would not support a claim of fraud or misrepresentation under New York law. *See Union Car Advertising*, 263 N.Y. at 399; *Elghanian*, 249 A.D.2d at 206. It thus does not qualify as "wrongful means." Furthermore, this statement does not derogate Plaintiffs; it is only puffery on the part of Park Place. Incidentally, it appears that the Chiefs, who had prior experience with the federal approval process, did not rely on Mr. Cummis' corporate braggadoccio. Ransom Dep. at 2451 Thompson Dep. at 128, 191, 230-31.

There is also no evidence in the record that Park Place advised the Tribe that the Tribe's agreements with Plaintiffs were not valid because they were not signed by the proper tribal authorities. Cummis Dep. at 361-62. Moreover, the validity of the various agreements—at least on that ground—was a matter of tribal law, as to which the Tribe would hardly rely on an outsider like Park Place.

Thus, there is absolutely no support in the record for Plaintiffs' claims that Park Place induced the Tribe to abandon their venture by making any misrepresentation about any subject.

As their fallback, Plaintiffs claim that the Defendant overlooked evidence of other wrongful conduct, namely:

> 1. That Park Place applied significant economic pressure on the Tribe to extract an agreement to develop a casino that included an exclusive right for Park Place to develop other casinos for the Tribe; and
>
> 2. That Park Place induced the Tribe to breach the LPA.

Obviously, the latter argument falls by the wayside now that I have concluded that the LPA was not a valid and binding contract. Park Place argues that there is no evidence to support Plaintiffs' contention that it exerted wrongful economic pressure over the Tribe. It further argues that any alleged "wrongful conduct" on its part worked Plaintiffs no harm. I agree on both points.

b. There Is No Evidence That Park Place Exerted Economic Pressure over the Tribe to Induce Them to Sign an Exclusive Contract with Park Place

Plaintiffs argue that Park Place applied economic pressure to the Tribe and to its Akwesasne casino business partners to induce the Tribe to repudiate its business relationship with Plaintiffs. There is no evidence from which a reasonable trier of fact could so conclude. Park Place most certainly offered the Tribe economic inducements that influenced the Tribe's decision to change business partners from Catskill to Park Place, but nothing Plaintiffs allege rises to the level of wrongful economic pressure.

The relevant facts are not in dispute. In the beginning of 2000, the Tribe was in substantial financial

trouble because of the failing Akwesasne Casino. It owed $3 million to the State of New York. The State made an explicit demand for this money on April 7, 2000. The Chiefs testified that they desperately needed the money. The Chiefs themselves approached Park Place and asked for a loan in that amount as consideration for the right to develop casinos elsewhere in the State. Ransom Dep. at 47-49, 61, 347-48; Thompson Dep. at 65-68. They never asked Plaintiffs for a $3 million loan because they didn't think that Plaintiffs would have that money. Smoke Dep. at 295. The Chiefs all agreed that saving the Akwesasne Casino and the 500 jobs the Casino provided was "the number one priority for the Chiefs in the Spring of 2000." Defendant's Memorandum, at 24 (citing Ransom Dep. at 47-49; Smoke Dep. at 104-05, 108-09, 116; Thompson Dep. at 46-47).

Plaintiffs argue that Park Place exerted wrongful economic pressure by playing on the Chiefs' desperation, promising them the $3 million loan, but only on the condition that Park Place become the exclusive developer of casinos for the Tribe in New York State. I assume for purposes of the motion that an exclusive development contract was the *quid pro quo* for the loan. The question is whether, as a matter of law, that constitutes wrongful economic pressure.

Plaintiffs cite *Italian and French Wine Co. of Buffalo, Inc. v. Negociants USA*, Inc., 842 F. Supp. 693 (W.D.N.Y. 1993), as support for its argument that Park Place exerted wrongful economic pressure by requiring an exclusive agreement, and thereby forcing the Tribe to terminate its business relationship with Plaintiffs. *In Italian and French Wine*, plaintiff was a wholesale distributor of wine and liquor in upstate New York who believed it had a binding con-

tract—or at least the promise of a binding contract—with an American marketing representative of a particular Australian wine company. Defendant, a competitor of plaintiff's, was the marketing representative's largest distributor of the Australian wine in New York State. Plaintiff alleged that defendant interfered either with its existing contract with the wholesaler or with its prospective business relationship (depending on how the contractual validity issue was resolved) by threatening to terminate own contract with the marketing representative unless the marketing representative refused to do business with plaintiff. *Id.* 842 F. Supp. at 701-02. On defendant's motion to dismiss, the court found that plaintiff had stated a cause of action for tortious interference with prospective contractual relations because, if the facts as alleged in the complaint were true, defendant's conduct might be found to constitute wrongful "economic pressure." *Id.*, 842 F. Supp. at 702.[39]

The present action is distinguishable from *Italian and French Wine* on multiple grounds. In *Italian and French Wine*, the defendant threatened to terminate a binding contractual obligation on its part in order to suppress competition. Here, by contrast, Park Place did not threaten to terminate any pre-existing binding obligation between itself and the St. Regis Mohawks in order to become part of the casino development project; Park Place had no such contract to use as leverage. More important, this case does not involve any anti-competitive conduct, since the Tribe plans to develop only one casino in the Catskills—the only question is who its non-Tribal partner should be.

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[39] The validity of the alleged contract could not be resolved on the motion to dismiss, so plaintiff's claim for tortious interference with contract was not dismissed, either.

In the absence of any binding (which means governmentally-approved) agreement with plaintiffs, neither Catskill nor Park Place enjoyed a position superior to any other contender for that honor. Finally, in this case, the Tribe and Plaintiffs did not have any arguably enforceable contract with which Park Place could interefere (as plaintiff claimed it had in *Italian and French Wine*). *Cf. Perry v. International Transport Workers' Federation*, 750 F. Supp. 1189 (S.D.N.Y. 1990) ("If the interferer acts with a business (competitive) motive as well as with a malicious one, the conduct may be actionable when there is an existing contract").

The situation here is relatively simple. The Tribe needed money. Park Place had money. The Tribe asked Park Place for money. Park Place had no obligation to give the Tribe any money. So it bargained with the Tribe. Both parties came to the decision that an exclusive casino development contract was a fair trade for the immediate $3 million loan. That is not improper economic pressure. As a sister Court found earlier this year in a related case, *Scutti Enterprises v. Park Place Entertainment Corp.*, 6:01-CV-06533 (W.D.N.Y. 2002), "The Mohawks simply choose [sic] an offer that paid them cash immediately, without the need for NIGC approval, over a deal that had been pending for approximately three years, but which could not be consummated because the NIGC refused to approve the project." *Id.*, at 14.

c. The Fact That Park Place Allegedly Engaged in Acts of Fraud and Misrepresentations to Others Not Part of the Tribe Does Not Constitute "Wrongful" Conduct

Finally, Plaintiffs allege that Goldberg and Cummis committed fraudulent acts and made misrepresentations to certain people—Peter Bronner, Gary Melius and Ivan Kaufman—in order to get an introduction to the Tribe. Plaintiffs claim that Park Place (through Goldberg) entered into an oral contract with Bronner, promising to pay him a commission in exchange for an introduction to the Tribe, and then disavowed its agreement once Park Place had its entree. Plaintiffs allege that Goldberg also entered into an agreement with Melius, promising to pay him $15 million for an introduction to the Tribe. Plaintiffs claim that Goldberg disavowed this agreement, too, after he and Cummis were introduced to the Tribe. Finally, Plaintiffs allege that Goldberg and Cummis promised Kaufman that Defendant would buy out his company's interest in the Akwesasne Casino, which was losing money and was at the risk of being closed, in exchange for an introduction to the Tribe. As was the case with Melius and Bronner, Plaintiffs allege that Defendant reneged on this agreement after Defendant was introduced to Tribal officials. It is not clear which, if any, of these men actually introduced Defendant to the Tribe.

Defendant argues that Plaintiffs have no standing to complain about the fact that Park Place refused to do a deal with these individuals because Plaintiffs suffered no damages from that refusal.

There is no evidence that Bronner, Melius and Kaufman were members of the Tribe or exercised any

control over the actions of the Tribe. Plaintiffs have no standing to complain about how Park Place treated these men; it is they, not Plaintiffs, who suffered any injury that flowed from this alleged misconduct. This court may not infer that Defendant and its principals made misrepresentations to the Tribe because they may have made misrepresentations to other individuals about matters that have nothing to do with Plaintiffs. *See Scutti Enterprises v. Park Place Entertainment Corp.*, 6:01-CV-06533 (W.D.N.Y. 2002).

Scutti bears comment because it is so closely related to this case. The plaintiff in Scutti was a former business partner of Alpha Hospitality, Inc., an affiliate of Plaintiffs. Scutti, allegedly a proposed operator of the Mohawks' Bingo Palace at Akwesasne, sued Park Place for interference with prospective business relations after Park Place signed a $6 million loan agreement with the Mohawks. Scutti alleged that Park Place compelled the Tribe to scuttle plans to expand the Bingo Palace at Akwesasne so as to ensure that the casino had sufficient cash flow to repay the Park Place loan. Scutti, like Plaintiffs here, asserted that Park Place's alleged mistreatment of Kaufman (as well as its alleged mistreatment of the Plaintiffs in this case), made Plaintiffs' conduct toward Scutti "wrongful."

In his March 11, 2002 decision, Judge Telesca rejected Scutti's argument that Park Place's alleged wrongdoing toward Kaufman and the Catskill plaintiffs could serve as a basis for plaintiff's claim of interference with his prospective business venture. *Scutti*, at 12, 16-17 (". . . Park Place's alleged wrongdoing with respect to other entities not party to this lawsuit are irrelevant to the question of whether or

not Park Place used wrongful means to interfere with the Scutti/Mohawk relationship"). *See also Excel Group, Inc. v. Permis Const. Corp.*, 254 A.D.2d 451, 452, 678 N.Y.S.2d 778, 779 (2d Dep't 1998) (defendant's improper use of another party's intellectual property does not make the defendant's interference with plaintiff's business relationship "wrongful"); *Worldwide Communications, Inc. v. Rozar*, 1997 U.S. Dist. LEXIS 20596, 1997 WL 795750, at *8 n.23 (S.D.N.Y. Dec. 20, 1997) (counterclaim defendants' alleged threats to counterclaim plaintiff are not relevant to tortious interference claims since the threats were unrelated to any third-party contractual relations). The same reasoning bars Catskill's reliance on the wrongs allegedly done to third parties by Park Place.

2. Plaintiffs Can Not Prove That Any Statements Made By Defendant or Any Actions Taken By Defendant Were The "But For" Cause of the Tribe's Decision

Even if a trier of fact could find "wrongful conduct," the record contains no evidence that the alleged conduct was the "but for" cause of the Tribe's decision to sign an exclusive agreement with Park Place and to end its relationship with Plaintiffs.

To recover for tortious interference, Plaintiffs must show that their relationship with the Tribe was actually injured by Defendant's actions. In order to do this, Plaintiffs must show that they would have consummated their proposed business transaction with the Tribe and opened a casino at the Monticello Raceway but for Park Place's alleged wrongful conduct. Proving this "but for" causation requires more than a showing that it was "reasonably certain" or that Plaintiffs had a "reasonable expectation" that

the casino deal would be consummated. *See Union Car*, 263 N.Y. at 401, 189 N.E. at 469; *Fine v. Dudley D. Doernberg & Co., Inc.*, 203 A.D.2d 419, 610 N.Y.S.2d 566 (2d Dep't 1994); *Williams & Co. v. Collins*, Tuttle & Co., 6 A.D.2d 302, 306, 176 N.Y.S.2d 99, 103 (1st Dep't 1958).

Defendant claims that Plaintiffs can not establish "but for" causation for two reasons: (1) there is overwhelming evidence in the record that the Tribe would have signed an agreement with Park Place, even in the absence of the purported derogatory comments; and (2) even if the Tribe did not sign with Park Place, there were innumerable contingencies, all of which would have to be fulfilled, before Plaintiffs could have consummated their project with the Tribe.

In response, Plaintiffs ask the Court to apply a different standard in determining causation. They argue that they do not have to establish that they would have ended up with a valid agreement with Park Place but for Defendant's comments, but that they need only show that there would not have been a termination of the business relationship with the Tribe but for Defendant's conduct,. Based on that standard, Plaintiffs argue that there is sufficient evidence from which a jury could conclude that the Tribe would not have terminated its relationship with Plaintiffs but for the wrongful conduct of Park Place.

I decline Plaintiffs' invitation to devise a new standard for recovery in a tortious interference with prospective business relations case. As I stated in *Catskill I*, the proper standard used to show the causation element of a tortious interference with prospective business relations is whether the Plaintiffs can prove that, but for the defendant's actions, plaintiffs would

have consummated the prospective contractual relations with the Tribe. *See Catskill I*, 144 F. Supp. 2d at 232; *Union Car Advertising Co., Inc v. Collier*, 263 N.Y. 386, 401, 189 N.E. 463, 469-70 (1934); *American Preferred Prescription, Inc. v. Health Mgmt., Inc.*, 252 A.D.2d 414, 418, 678 N.Y.S.2d 1, 4 (1st Dep't 1998); Riddell *Sports, Inc. v. Brooks*, 872 F. Supp. 73, 78 (S.D.N.Y. 1995) ("[A] plaintiff must allege that, but for defendant's conduct, his prospective business relations would have coalesced into an actual contract."); *Warner Bros. Pictures, Inc. v. Simon*, 21 A.D.2d 863, 863-64, 251 N.Y.S.2d 70, 71 (1st Dep't 1964). "Tortious interference with business relations 'applies to those situations where the third party would have entered into or extended a contractual relationship with plaintiff but for the intentional and wrongful acts of defendant.'" *M.J.&K. Co. v. Matthew Bender & Co.*, 220 A.D.2d 488, 631 N.Y.S.2d 938, 940 (2d Dep't 1995) (quoting *WFB Telecommunications v. NYNEX Corp.*, 188 A.D.2d 257, 590 N.Y.S.2d 460, 461 (1st Dep't 1992)).

The cases that Plaintiffs cite do not support a lower standard than the one announced in *Catskill I*. *See Merrill Lynch Futures, Inc. v. Miller*, 680 F. Supp. 1033, 1040 (S.D.N.Y. 1988) ("A plaintiff must plead and prove that 'but for the unlawful actions of defendant, the contract would have been performed.'") (quoting *Demalco Ltd. v. Feltner*, 588 F. Supp. 1277, 1280 (S.D.N.Y. 1984)); *Special Event Entertainment v. Rockefeller Center, Inc.*, 458 F. Supp. 72, 78 (S.D.N.Y. 1978) (same).

One case cited by Plaintiffs, *Sharma v. Skaarup Ship Management Corp.*, 916 F.2d 820, 828 (2d Cir. 1990) does state that in order to maintain a tortious interference with contractual relations claim, plain-

tiffs must establish that there would not have been a breach of a contract but for the activities of Defendant. But this case is distinguishable on many levels. First, it was a decision on a motion to dismiss, and the Court was addressing the minimal allegations necessary to preserve the tortious interference claim. Second, the claim was one for tortious interference with contractual relations, not prospective business relations. "The tort of interfering with prospective contractual relations has more demanding requirements for establishing liability than those required for existing contractual relationships." *Italian & French Wine*, 842 F. Supp. at 701 (citing Perry, 750 F. Supp. at 1207). Third, the cases cited by the *Sharma* court—*Special Event Entertainment and Merrill Lynch Futures*—simply don't support the proposition that all plaintiffs must show is that there would not have been a breach of contract but for defendant's wrongful conduct; both of these cases, as cited above, state that "plaintiff must plead and prove that 'but for the unlawful actions of defendant, the contract would have been performed.'" *Merrill Lynch Futures*, 686 F. Supp. at 1040.

Therefore, in order for Plaintiffs to prove that damages resulted from Park Place's alleged wrongful conduct, they would have to establish that, but for this alleged conduct, Plaintiffs and the Tribe would have continued their business relationship and received the approvals necessary to build and open the casino. This they cannot do.

Defendant claims that the Tribe would have signed with Park Place regardless of any alleged wrongful conduct on its part, because (1) Plaintiffs' relationship with the Chiefs was strained to the breaking point and the Chiefs were frustrated with the long

delay in the approval process, and (2) objectively, Park Place's proposal was significantly more favorable to the Tribe than Plaintiffs' proposal. There is ample evidence, in the form of deposition testimony and various communications and documents, that the Chiefs did not enjoy a good business relationship with Plaintiffs and were eager to discuss any alternative casino development offers. Evidence shows that the proposed casino deal between Park Place and the Tribe provides much more monetary and management benefits to the Tribe than in Plaintiffs' proposed casino deal.

However, there is no need to explore this ground, because there is a more fundamental flaw in Plaintiffs' position: no reasonable trier of fact could conclude that Plaintiffs would have "consummated" their deal with the Tribe. The very legality of Plaintiffs' project has yet to be determined by New York courts. The Governor had not approved the project. The BIA has not approved final transfer pursuant to 25 C.F.R. Part 151. No compact allowing the Mohawks to undertake casino gambling in the Catskills has been signed or approved by the federal government. After four years, Plaintiffs' contracts with the Tribe had not been approved by the NIGC. Plaintiffs never received approval from the New York State Racing & Wagering Board. And Plaintiffs never received financing for their project. Plaintiff cannot demonstrate that any of these necessary predicates to its project would inevitably have come to fruition, let alone that all of them would have.

a. The Legality of Any Indian Gaming Project Has Yet to be Determined in New York

The prospect of any casino's opening in the Catskills is unclear at best. I directed the parties to address the significance of pending litigation challenging the legality of gaming compacts with Indian tribes in the State of New York and, in particular, the Third Departments's recent decision in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 740 N.Y.S.2d 733, 293 A.D.2d 20 (3d Dep't 2002).

In Saratoga, the question on appeal was whether, "as the result of the interaction of gaming policies established by the State's Constitution and statutes and Federal law, defendant Governor had the authority to execute a Tribal-State compact and amendment with the St. Regis Mohawk Tribe, allowing certain class III gaming activities on the Tribe's reservation." *Saratoga County*, 740 N.Y.S.2d at 734. The Third Department affirmed the lower court's ruling which held that Governor Pataki had violated the separation of powers doctrine when he entered into a compact with an Indian tribe allowing gambling on tribal lands under less onerous circumstances than those imposed on same gambling activities elsewhere in the state. *Id.* 735.

Although legislative approval for signing Indian gaming compacts was expressly given to the governor by the legislature in October 2001, Ex. 23 to *Carpinello Decl.*, that legislation, in turn, has come under challenge in *Karr v. Pataki*, Index No. 718-02 (Sup. Ct. Albany Cty.) and *Dalton v. Pataki*, Index No. 719-02 (Sup. Ct. Albany Cty.). No decision has been made in either of those cases challenging the constitutionality of the October 2001 bill. Until those

litigations are resolved by the New York Court of Appeals, it is impossible to say with certainty that any Indian gaming facility intended to be built in the State of New York will pass legal muster.

b. The Governor Has Not Approved the Project

In 1996, Catskill and the Tribe sought BIA approval of the application to place the Monticello Raceway property into trust for the benefit of the Tribe (the "land-into-trust" transfer). On April 6, 2000, the Assistant Secretary for Indian Affairs wrote to Governor Pataki, explaining that, after review of the application, he had "determined that a gaming establishment on the 29.31 acre-parcel of land located in Monticello, New York, would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. . . . Pursuant to Section 20 of IGRA, I seek your concurrence in this determination." *Catskill I*, 144 F. Supp. 2d at 226. Governor Pataki never responded to the BIA's recommendation that the land-into-trust application be approved.

Defendant argues that Plaintiffs can not establish that the Governor ever would have concurred with the BIA's recommendation. I agree. The evidence strongly indicates that no such concurrence would have been forthcoming absent (1) agreement on a new gaming compact and (2) settlement of all land claims with the State of New York. *Id.* Indeed, the Chiefs testified that they were told that the Governor would withhold his consent until the land claims were settled. Smoke Dep. at 319-20; Ransom Dep. at 63-67; Thompson Dep. at 192-93, 195,288-89. *See* generally Exs. 4 & 10 to *Carpinello Decl.*

Needless to say, those claims have not been settled. The Mohawk land claims litigation has been pending for over twenty years. While the record (and press reports) suggest that the long-running lawsuit between the State and the Tribe is "virtually settled," R. Berman Dep. at 119-20, 489-91, 550, there is many a slip between the cup and the lip. Of particular note, any settlement needs to be ratified by the Mohawk Nation, Ransom Dep. at 67-68, 332-333, and there is absolutely no guarantee that it will be approved. Thompson Dep. at 194-95.

Mounting local opposition to Plaintiffs' proposed casino made the Governor's concurrence even more questionable. Plaintiffs had originally received substantial support from Sullivan County, the Town of Thompson and the Village of Monticello, because the Tribe had entered into a Memorandum of Understanding in 1996 that expressly promised direct payments to each of the municipalities to mitigate any harmful effects of the operation of the casino. *See* Ex. 30 to Carpinello Decl. Subsequent to that Memorandum of Understanding, Plaintiffs entered into an agreement with the Village of Monticello that met with the disapproval of the Supervisor of the Town of Thompson and the Sullivan County Legislature. Ex. 31 to Carpinello Decl. As of a result of the Monticello agreement, the Chairman of the Sullivan County Legislature testified that, unless the Plaintiffs were to encourage the Tribe to negotiate new agreements providing for similar benefits to the Town and the County, the County would unequivocally oppose a transfer of land-into-trust and would urge the Governor not to concur in any such land transfer. Pomeroy Dep. at 107-18; Ex. 32 to *Carpinello Decl.* The Town of Thompson Supervisor expressed the same view. Cellini Dep. at 117-45. This local opposition to the

Governor's concurrence further weakens the already weak probability that the Governor would have ever concurred and allowed the land-into-trust transfer necessary to operate the casino.

c. The BIA Has Not Approved Final Transfer Pursuant to 25 C.F.R. Part 151

As of April 14, 2000, the BIA had given approval to the Tribe's land-into-trust application pursuant to § 20, 25 U.S.C. § 2719. *Catskill I*, 144 F. Supp. 2d at 226. However, certain procedures and contingencies had to be fulfilled before this approval could become final. 25 C.F.R. § 151.12 requires the publication of notice of the final decision of the BIA, and title cannot be taken sooner than 30 days after such notice is published. Such notice was never published for the Monticello site. If notice were published, interested parties—such as the Town of Thompson, the County of Sullivan, other project opponents, or others including those who brought the Saratoga County action—could challenge the BIA's determination.

Second, in its Findings of Fact, the BIA made it clear that transfer of title depended upon the BIA's certifying the accuracy of Plaintiffs' appraisal of the value of the land. Ex. 25 to Carpinello Decl. at CD56216. The BIA stated:

> The Land Purchase Agreement established a purchase price of $10,000,000. The Monticello Property was appraised at $95,760,000 as of July 1, 1999, by Appraisal Group International (Binder III, Tab K). The Bureau of Indian Affairs will certify the accuracy of this appraisal before the land can be taken into trust pursuant to 25 CFR Part 151.

Id. At the same time that the BIA was reviewing the land into trust application, the NIGC was reviewing the management contract applications. In its never completed review of the LPA, the NIGC on several occasions indicated that the $10,000,000 purchase price appeared inflated, included some hidden management "compensation," and was simply not the "value" of the land. Ex E to Park Place's Motion for Reconsideration, CD32296, CD55627.063. Indeed, in one letter to the NIGC, Mohawk Management admitted that the $10,000,000 purchase price of the land was part of the Tribe's "pre-development costs" owed to Plaintiffs. *Id.* atCD 75198. If (and when) the BIA became aware of the fact that the 30 acres of land, without improvements, was not worth $95,760,000—and, indeed, was not even worth $10,000,000—it is doubtful that it would have certified the appraisal. [40]

Thus, while the BIA had given the transfer initial approval, lack of gubernatorial concurrence was far from the only obstacle to finalization.

d. No Tribal/State Compact Had Been Signed or Approved by the Federal Government

The Mohawks have no right to undertake casino gambling in the Catskills without New York State's approval in the form of a tribal/state compact. The 1993 compact with the Mohawks allows only for the playing of table games and only at Akwesasne. Ex. 33 to Carpinello Decl. It has no provision for electronic

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[40] An appraisal procured by plaintiffs places the value of the undeveloped land at $150,000 (Plaintiffs' Mem, at 50; Tahbaz Dep. at 713-715, 727-31; Vardi Dep. at 16-17; Vardi Appraisal, Ex. 21 to Carpinello Reply Decl.)—well below any level that might have been acceptable to the BIA.

games anywhere or for any form of gaming outside the reservation. A one-year compact allowing for the operation of electronic games at Akwesasne expired in May 2000. Ex. 34 to Carpinello Decl. Moreover, two subsequent amendments that would have allowed electronic games only at the Akwesasne Casino were rejected by the Department of the Interior. Exs. 35 and 36 to Carpinello Decl. Thus, even assuming that the Governor has the legal authority to enter into such a compact, the signing of such a compact and its approval by the federal government were not assured.

e. Plaintiffs' Contracts Had Not Been Approved by the NIGC

No casino could be built without approval by the NIGC of Plaintiffs management contract (which we now know includes all collateral agreements). Those contracts had been under review for four years, and from the NIGC correspondence, the NIGC was not close to approval in April 2000, when the process ground to a halt. The NIGC spent over two years investigating the backgrounds of Plaintiffs, and when Plaintiffs were unwilling to fund further background investigations, they asked the NIGC to convert their application from approval for a Class II and Class III casino to Class III alone. R. Berman Dep. at 438; Exs. 40 and 41 to Carpinello Decl.

Notwithstanding this change, the NIGC reserves the right to reject any management agreement based upon the suitability of the proposed manager *See* 58 F.R. 5818, 5819, quoting 25 U.S.C. § 2711 (e)(1)(D); 25 C.F.R. § 533.6(c).

In January 2000, the NIGC raised serious concerns relating to Plaintiffs' Mississippi casino experience.

Ex. 22 to Carpinello Decl. Plaintiffs responded to these issues, Ex. 67 to Carpinello Decl., but the NIGC was not satisfied with Plaintiffs' response. Thompson Dep. at 269-70; Ex. 8 to Carpinello Decl. at 10.

Any prediction as to whether the NIGC would have ever found Plaintiffs to be suitable for management of an Indian casino is, in the words of NIGC counsel, "raw speculation." Ex. 68 to Carpinello Decl. No jury could ever find that Plaintiffs would have received all of the requisite governmental approvals necessary in order to consummate their project if the Tribe had not signed an exclusive agreement with Park Place. Plaintiffs themselves admit that this is an impossible burden for anyone to carry. *Memorandum in Opposition*, at 32. Unfortunately for plaintiffs, the impossible burden lies squarely on their shoulders.

f Plaintiffs Never Received Approval From the New York State Racing & Wagering Board

Even if the Governor concurred in the BIA land-into-trust determination, the BIA gave final approval, the Mohawk land claims were resolved, a tribal/state compact was entered into and the NIGC gave approval to Plaintiffs' management agreements, Plaintiffs would still have had to receive a finding of suitability by the New York State Racing & Wagering Board. The NIGC told the Chiefs that such approval would take a year. Thompson Dep. at 275-76. Ex. 8 to Carpinello Decl. at 12. Plaintiffs had not even applied for this approval as of April 14, 2000, when the Tribe signed on with Park Place. However, the Board already had some problems with Plaintiffs.

When approving Catskill Development's operation of the Monticello harness track, the Racing & Wa-

gering Board insisted that Robert Berman step aside as President of Catskill Development because of his involvement in a questionable bankruptcy action and the numerous judgments entered against him in that action. Ex. 71 to Carpinello Decl. at 14. Additionally, the Board's investigation of Alpha noted Alpha's checkered history in the casino business. Ex. 71 to Carpinello Decl. at 17. In approving the operation of the harness track, the Board noted that its decision was made in part because Alpha would have no role in the operation of the raceway itself. *Id.* The casino, however, was going to be run by Plaintiff Mohawk Management LLC, half of which is owned by Alpha through a wholly-owned subsidiary. Ex. 74 to Carpinello Decl. The Board's previously-expressed concerns make the Board's approval of Plaintiffs operation of a Class III gaming casino at the Monticello Raceway highly questionable.

g. Financing Was Never Secured for the Casino Project

Plaintiffs and the Tribe could not build their proposed casino without capital to construct the casino project. Securing this financing was far from certain.

Wendell Brooks of Salomon Smith Barney, Plaintiffs' financial advisor, voiced many serious concerns over Plaintiffs' ability to obtain financing for the project. Brooks testified that one of the keys to a successful operation of a Native American casino was the formation of a "first-class casino operating team." Brooks felt that Plaintiffs never put such a team in place. Brooks Dep. at 82-83. He recommended to Plaintiffs that they hire an "established operator" or a "reputable management company" in order to provide "credibility to the financial markets." Brooks Dep. at 41-43, 75-80. Further, he advised them that

the financial viability of the project would be enhanced if a substantial equity investment was obtained, and if they secured a "back end completion guarantee" to assure the financing community that the project would be built. Brooks Dep. at 51-53, 68-70, 75, 85, 91-92, 121-22. As of April 14, 2000, Plaintiffs had none of these things. At no time did Salomon Smith Barney or anyone else to raise the funds necessary to build the proposed casino. Brooks Dep. at 54, 77-78, 119, 123; Thompson Dep. at 38.

* * * *

It is difficult to succeed on a tortious interference action relating to a new business. Proving "but for" causation is always difficult. Plaintiffs have failed to raise a genuine issue of fact as to whether "but for" causation exists, The obstacles standing in the way of Plaintiffs' consummating a deal with the Tribe were numerous and overwhelming, and plaintiffs have submitted no evidence from which a trier of fact could reasonably conclude that Catskill's casino would ultimately have been approved and built. Thus, Plaintiffs' claim for tortious interference with prospective business relations is dismissed. There is no need to address the issue of damages.

CONCLUSION

For the reasons discussed above, Defendant's motion for summary judgment is granted and both of Plaintiffs' remaining claims are dismissed. Defendant's motion for reconsideration is denied as moot.

This is the decision and order of the Court.

The Clerk of the Court is ordered to close this file.

Dated: August 22, 2002
Colleen McMahon
U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 8660 (CM)(GAY)

CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., AND MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C.,
Plaintiffs,

against

PARK PLACE ENTERTAINMENT CORP.,
Defendant.

July 23, 2001, Decided

OPINION

JUDGES: Colleen McMahon, U.S.D.J.

OPINION BY: Colleen McMahon

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF CATSKILL DEVELOPMENT'S MOTION FOR RECONSIDERATION

McMahon, *J.*:

Plaintiff Catskill Development, LLC ("Catskill Development") asks that the Court reconsider its May 14, 2001 Memorandum Decision and Order granting in part and denying in part defendant Park Place's motion to dismiss. Specifically, plaintiff requests reconsideration of that portion of the May 14 decision in which I held that plaintiffs had failed to state a claim for tortious interference with one of the con-

tracts at issue in the lawsuit, the Land Purchase Agreement.

For the reasons stated below, Catskill Development's motion to reconsider is granted, and upon reconsideration, the motion to dismiss the claim for tortious interference with the Land Purchase Agreement is denied.

BACKGROUND

Catskill Development and the other plaintiffs in this suit—Mohawk Management, LLC ("Mohawk Management") and Monticello Raceway Development Co. LLC ("Monticello")—are members of a group of businessmen and developers (hereinafter the "Catskill Group") who, beginning in 1995, sought to build and operate a casino at a site adjacent to the Monticello Racetrack in Monticello New York. Because gambling is illegal in New York State except on Native American lands and under certain conditions, the Catskill Group partnered with the St. Regis Mohawk Tribe on the project.

The full history of the relationship between the developers and the Tribe is outlined in the May 14 decision. *Catskill Development LLC v. Park Place Ent. Corp.*, 144 F. Supp. 2d 215, 2001 WL 533222 (S.D.N.Y. 2001) (no page refs avail.). Catskill Development contends that I did not accurately describe plaintiffs' deal with the Tribe in that opinion, and that, once the inaccuracies are corrected, my conclusion that the Land Purchase Agerement is a voidable collateral agreement is demonstrably erroneous.

It appears that the Court was laboring under certain misapprehensions about the particulars of the various transactions. Plaintiffs are partly responsible for the Court's failure to understand fully the details

of the project, since they submitted precious little background information and I had to glean what I could from project documents provided by the defendant. Plaintiffs have used this motion to fill in the gaps in their earlier papers. It now appears that the deal was structured as follows:

Plaintiff Catskill Development bought the Monticello Raceway in 1996 for $10 million, and set aside approximately 30 acres of that property for the casino. The plan was to transfer these 30 acres to the U.S. Government to be held in trust for the Tribe, in exchange for which the Tribe would pay plaintiff Catskill Development $10 million in cash. This aspect of the project was set out in an amended and restated Land Purchase Agreement (hereinafter the "LPA"), executed between the plaintiff Catskill Development and the Tribe's Gaming Authority. The Tribe was to pay for the land with the proceeds of a loan, which the Tribe would obtain from a third-party lender, pursuant to a Leasehold Mortgage Agreement ("LMA").

The Catskill Group created a separate entity, plaintiff Monticello Raceway Development Co. LLC ("Monticello") to develop and build the casino and the real property surrounding the casino site. Plaintiff represents that Monticello is owned "by a minority of Catskill Development members." (*See* Pl. Brief in Supp. of Mot. for Reconsid. at 7.) The terms of Monticello's involvement were set out in another agreement, the Development and Construction Agreement, under which Monticello would receive a "development fee" of 5% of the costs of the development and construction. Monticello agreed to use commercially reasonable efforts to assist the Tribe in obtaining fi-

nancing for the development, construction, and start-up of the casino.

The Catskill Group also created a third entity, plaintiff Mohawk Management, to manage, operate and maintain the casino for seven years. Plaintiff Catskill Development has a 50% voting interest in plaintiff Mohawk (the other 50% is controlled by Alpha Hospitality Corp. ("Alpha"), a publicly traded corporation). Under the Gaming Facility Management Agreement ("Management Agreement"), plaintiff Mohawk was to receive 35% of annual profits (net of debt service). Mohawk also agreed to help the Tribe obtaining financing to build and operate the casino.

As plaintiff now makes clear, the activities of Mohawk Management under the Management Agreement were limited to those gaming activities defined under the Indian Gaming Regulatory Act (IGRA) as "Class III," which include (but are not limited to): table games (such as baccarat and blackjack), casino games (such as roulette and craps), slot machines, and electronic gaming terminals. *See* 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.4. The Management Agreement did not cover Class II games (bingo, lotto, and games similar to bingo or lotto), which were to be managed by the Tribe. 25 U.S.C. § 2703(7); 25 C.F.R. § 502.4.

While the Tribe and plaintiff Mohawk were to operate the casino, plaintiff Catskill Development was to operate the adjoining racetrack facility separately. The Tribe was not to have any role in the operation of the racetrack. Thus, Catskill Development and the Gaming Authority also executed a Shared Facilities Agreement, to ensure that the racetrack and the casino would be properly maintained and repaired, and

to allocate responsibility for the upkeep and repair of common areas.

Catskill Development argues that, in determining the validity of the separate agreements between the Tribe and the plaintiffs, the Court erroneously viewed the plaintiffs as a single entity and "commingled" the distinct rights and obligations of each of these the three plaintiffs, whom Catskill Development argues are "related but independently own and controlled." (Br. in Supp. of Mot. for Reconsid. at 6.) In their response to the motion to dismiss, plaintiffs did not bother to refer to the individual plaintiffs in discussing the separate agreements.[41] However, as the complaint contains separate allegations of tortious interference with each of the four agreements, with the appropriate entity named as the party plaintiff, I agree that it was confusing to adopt plaintiffs' use of the amalgamated term "Catskill," and in this opinion I will take care to differentiate among the three plaintiffs. I note, however, that the individual plaintiffs do not operate as independently as Catskill Development now claims in the motion for reconsideration. In particular, I find disingenuous

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[41] For example: "Plaintiffs Catskill . . ., Mohawk . . ., and Monticello . . . (all hereinafter referred to as "Catskill")" (Mem. in Opp. to Def.'s Mot. to Dismiss at 1.); "On December 14, 1999, revised agreements with Catskill. . . ." *(Id.* at 2.); "On March 10, 2000, BIA "identified the remaining issues to be addressed by the Mohawks and Catskill" (*Id.*); "The Land Purchase Agreement, Management Agreement, and Development Agreement are each enforceable contracts between Catskill and the Mohawks" *(Id.* at 8.); "In addition to the Land Purchase Agreement, Catskill and the Mohawks had other enforceable agreements with the Mohawks. The Management, Development and Facilities Agreement were enforceable preliminary agreements under which Catskill and the Mohawks again agreed to submit proposed agreements . . . ." *(Id.* at 14.)

plaintiffs attempt to characterize the land transfer as a separate transaction by an independent entity (Catskill Development) whose post-closing involvement in the casino would be tangential or non-existent.

The casino project was subject to extensive federal and state regulatory oversight under the Indian Gaming Regulatory Act (IGRA), codified at 25 U.S.C. § 2701 *et seq*. First, before a Tribe can operate a gaming establishment on newly-acquired trust lands, the Secretary of the Bureau of Indian Affairs (BIA) has to determine that "a gaming establishment on the newly acquired trust lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," but only after obtaining the concurrence of the Governor of the State in which the casino will be built (in this case, New York's Governor Pataki). 25 U.S.C. § 2719(b)(1)(A).

In addition to BIA approval, plaintiffs had to obtain approval of the Management Agreement by the Chairman of the National Indian Gaming Commission (NIGC). *See* 25 U.S.C. §§ 2705(a)(4), 2710(d)(9), 2711. Furthermore, plaintiffs and the Tribe could not install Class III games such as electronic gaming terminals in the casino until the Tribe re-negotiated, through Governor Pataki, its gaming compact with the State.

As set out in detail in the May 14 opinion, plaintiffs were in the process of obtaining the necessary approvals when defendant convinced the Tribe to deal only with it on any casino projects in New York State. At the time defendant allegedly induced the Tribe to break with plaintiffs, the Secretary of the BIA had determined that the project could proceed. However, Governor Pataki had not yet concurred,

and from documents submitted by the plaintiffs it appears that he was not likely to give this concurrence prior to successful renegotiation of the tribal-state compact. Thus, the BIA had not yet agreed to accept the land in trust for the Tribe, and the trust transfer had not yet occurred. Furthermore, the NIGC had not yet approved the Management Agreement.

Plaintiffs filed claims for tortious interference with contract, tortious interference with prospective business relations, unfair competition, and violations of New York's Donnelly Act. Defendant moved to dismiss plaintiffs' claim for tortious interference with contract on the grounds that none of the agreements executed between plaintiffs and the Tribe was a valid contract. Park Place argued that the lack of the necessary governmental approvals rendered the various agreements void.

In the May 14 opinion, I held that the Management Agreement was void under regulations passed pursuant to the IGRA which require that gaming management contracts not approved by the National Indian Gaming Commission (NIGC) are void and unenforceable. Catskill, 144 F. Supp. 2d 215 (citing 25 C.F.R. § 533.7). *See* also 25 C.F.R. § 533.1 (stating that Class II and III management contracts "shall become effective upon approval by the Chairman [of the NIGC]").

As to the LPA, the Development and Construction Agreement, and the Shared Facilities Agreement, I held that each of these was also void. I found that each of these agreements were collateral to the Management Agreement, under the definition of "collateral agreements" under provided in 25 C.F.R. § 502.5. Under section 2711(a)(3) of the IGRA, collateral

agreements are considered management contracts. Thus, because unapproved management contracts are void under C.F.R. §§ 533.1 and 533.7, I held that the collateral agreements were also void.[42] *See Catskill*, 144 F. Supp. 2d 215 (citing 25 U.S.C. § 2711 (a)(3) and *U.S. ex. Rel. Mosay v. Buffalo Bros. Mgmt.*, 20 F.3d 739, 743 (7th Cir. 1994) (explaining effect of IGRA on contracts with Indian tribes)).

Catskill Development now moves for reconsideration of the Court's holding, albeit only with respect to the LPA.

1. Plaintiff's Motion For Reconsideration Is Granted

To prevail on a motion for reconsideration, the movant must demonstrate "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *See Doe v. New York City Dept. of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983). The court's review "is narrow and applies only to already-considered issues; new arguments and issues are not to be considered." *See Morales v. Quintiles Transnational Corp.*, 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998). A motion for reconsideration "is not a substitute for appeal and 'may be granted only where the Court has over-

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[42] I also invalidated another document, the Leashold Mortgage Agreement, which I erroneously understood was to be executed between plaintiffs and the Tribe. Catskill Development notes that plaintiffs are not claiming that defendant tortiously interfered with this agreement, as it was to be executed between the Tribe and an unspecified mortgagee (who could not be identified until financing for the casino project could be arranged). Accordingly, that portion of the May 14 opinion which dismisses plaintiff's claim as to the Mortgage Agreement is vacated.

looked matters or controlling decisions which might have materially influenced the earlier decision.'" *See id.* (citations omitted).

Plaintiff argues that I should not have deemed the LPA a "collateral agreement" to the management contract. I will not revisit this holding. The agreements at issue in this case were all closely related.[43] Provisions of each agreement either triggered or worked in conjunction with provisions in the others. In addition, Catskill Development or one of its affiliates was to receive some form of compensation under each agreement, an arrangement which defendant argues would have led the NIGC to consider the deal *in toto*.[44] *See Approved Management Contracts v. Consulting Agreements*, NIGC Bulletin No. 94-5, October

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[43] Contrary to plaintiff's contention, the fact that each agreement was signed by different parties does not change this fact. A collateral agreement may also be a contract "related . . . to any rights, duties or obligations created between a tribe . . . [and] any person or entity related to a management contractor." Clearly, the LPA is "related" to the "rights, duties or obligations" between the Tribe and plaintiffs. There is no question of the relationship between Mohawk Management and Catskill Development, as evidenced by Catskill Development's 50% interest in Mohawk.

[44] In fact, defendant argues that the NIGC would have rejected the management agreement in light of the overall structure of the agreement between plaintiffs and the Tribe. Plaintiffs argue that they would have obtained NIGC approval relatively quickly in light of the extensive regulatory review conducted by the BIA—that in fact, this was the understanding. The Court will not speculate on any hypothetical progress or outcome of the NIGC "stage" of the approval process. However, I agree with defendant that the NIGC's responsibilities under the IGRA (including, for example, a determination of whether the fees to be collected comply with statutory mandates) would warrant review of all the project documents in this instance.

14, 1994 (noting in its guidelines that in order to determine whether or not a particular contract or agreement is a "management contract", the NIGC "must see the entire document including any collateral agreements and referenced instruments").

Nonetheless, I am granting the motion for reconsideration. Having again reviewed the relevant statute and the terms of plaintiff's agreements, I conclude that my application of section 2711(a)(3) to the Management Agreement and the other agreements in this case, whether collateral or not, was in error.

Section 2711(a)(3) states:

> For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

25 U.S.C. § 2711(a)(3). The phrase "management contracts described in paragraph (1)" refers to section § 2711(a)(1), which applies only to management contracts for the operation and management of Class II gaming operations. As the Court now understands, the Management Agreement in this lawsuit was explicitly amended in 1999 to provide that plaintiff Mohawk Management would manage only Class III games in the casino.[45] The amended Management Agreement is explicit: Mohawk Management has no responsibility for Class II games.

Collateral agreements are considered management contracts in the IGRA only when they relate to Class

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[45] Plaintiff states that purpose of this amendment was "to expedite the approval of the Management Agreement by the NIGC." (Mem. in Supp. of Mot. For Reconsid. at 9.)

II gaming. Therefore, sections 533.1 and 533.7 (the "voiding" regulations) do not apply to any of the agreements that I deem to be "collateral" to the Management Agreement. This includes the LPA.

The portion of the IGRA which applies the provisions of section 2711 to Class III management contracts does not change the above result. Section [HN5] 2710(d)(9) states in relevant part that the "Chairman's review and approval of such [Class III] contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title." 25 U.S.C. § 2710(d)(9). Thus, while most of the subsections of § 2711 apply to Class III contracts, § 2711(a)—including § 2711(a)(3)—does not.

Defendant argues that Congress could not have intended to restrict the application of section 533.7 to those agreements which are collateral to Class II contracts. I disagree. Congress provides for different treatment of Class II and Class III gaming in any number of places in the IGRA.[46] In addition to subsection (a), subsections (e) and (i) of section 2711 do not apply to Class III management contracts. There is no basis from which I may imply, as defendant urges, that Congress "meant to" subject contracts collateral to both Class II and Class III management agreements to the "voiding" regulations of

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[46] Class III gaming is also regulated by tribal-state compacts, thus necessitating less of a "protective role" for the NIGC in evaluation of Class III management agreements. *See* 25 C.F.R. § 501.2(d) ("Nothing in the [IGRA] or this Chapter shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with a State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by a Tribal-State compact that is entered into by an Indian tribe under the [IGRA] and that is in effect.")

the statute. It is not inconsistent to require that an agreement with a Tribe be subject to NIGC review on the basis of its relationship to a Class III management contract, and at the same time to place that same agreement outside the province of a strict voiding provision.

For the reasons discussed above, plaintiff's motion for reconsideration is granted, and upon reconsideration, I hold that the collateral agreements, including the LPA, are not subject to the voiding provisions of the IGRA. Accordingly, that portion of the opinion in which I held that the collateral agreements were void under 2711(a)(3) is vacated. This applies not only to the LPA, but the Development and Construction Agreement and the Shared Facilities Agreement. However, there were alternative grounds for voiding the other two agreements. The Shared Facilities Agreement was deemed void for lack of a condition precedent contained in the contract. *See Catskill*, 144 F. Supp. 2d 215. *See also* n.10 at *infra*, section 2. The Development and Construction Agreement was deemed void under 25 U.S.C. § 81. *See Catskill*, 144 F. Supp. 2d 215. In a footnote, Catskill Development argues that this holding was in error, due to a 1999 Amendment to section 81. There is, however, no need for me to decide whether the original or the amended section 81 applies, because it is now clear that the Development and Construction Agreement is void under IGRA as a management contract: plaintiff now represents to the Court that it was the position of the NIGC, expressed by letter dated April 19, 2000, that both the Management Agreement and the Development and Construction Agreement constituted "man-

agement contracts" for the purposes of NIGC review.[47] (Pl. Mem. at 16.)

2. The LPA Is Not Invalid Absent Approval Of The Trust Transfer

Defendant originally argued in its motion to dismiss that the LPA was not valid because final BIA approval for the land-trust transfer, required under 25 U.S.C. § 2719, was a condition precedent to the validity of the contract.[48] Because I found the LPA void as a collateral agreement to the Management Agreement, I did not address this argument. Defendant asks that I do so now.

A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is

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[47] That concession is no doubt why the proper plaintiff, Monticello, did not also move for reconsideration.

[48] Section 20 states that gaming shall not be conducted "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," unless certain limited conditions are met. 25 U.S.C.A. § 2719(a). Under the exceptions to § 2719(a), gaming on newly acquired trust lands may be conducted when:

> the Secretary, after consultation with the Indian tribe and appropriate State, and local officials . . . determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian Tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. . . .

25 U.S.C. § 2719(b)(1)(A) Unlike Section 2711, there is no regulation related to Section 2719 which explicitly states that contracts creating off-reservation gambling projects are void without the Secretary's approval. Indeed, defendant did not argue in its motion to dismiss that failure to obtain approval for the trust transfer operated to "void" the LPA.

excused, must occur before a duty to perform a promise in the agreement arises." *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691, 636 N.Y.S.2d 734, 737, 660 N.E.2d 415 (1995) (citing *Calamari & Perillo*, Contracts § 11-2, at 438 [3d ed.] and Restatement [Second] of Contracts § 224). However, not every condition in a contract is precedent to the existence of a valid, enforceable contract. *See Matco Elec. Co., Inc. v. American District Telegraph Co., Inc.*, 156 A.D.2d 840, 841, 549 N.Y.S.2d 843, 844 (3d Dep't 1989). As the court in *Oppenheimer* opined:

> Most conditions precedent describe acts or events which must occur before a party is obligated to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself. In the latter situation, no contract arises 'unless and until the condition occurs.'

Oppenheimer, 86 N.Y.2d at 690, 636 N.Y.S.2d at 737 (citing *Calamari & Perillo* at § 11-5, at 440). *See also Matco Elec. Co. v. American Dist. Tel. Co.*, 156 A.D.2d 840, 549 N.Y.S.2d 843 (3d Dept 1989)

The language of condition must be explicit. For example, the contract in *Oppenheimer*, a conditional letter agreement, contained more than one provision that explicitly declared that, in the absence of certain conditions, the agreement "shall be deemed null and void and of no further force and effect," and neither party was to have "any rights against nor obligations to the other." *Oppenheimer*, 86 N.Y.2d at 688, 636 N.Y.S.2d at 735-36. Another provision of the agreement stated that the parties "agree not to execute and exchange the Sublease unless and until . . . the

conditions set forth in paragraph (c) [requiring written consent] are timely satisfied." *Id.* The court held that the letter agreement contained a condition precedent, because it provided "in the clearest language that the parties did not intend to form a contract 'unless and until' defendant received written notice of the prime landlord's consent on or before February 25, 1987." *Id.* at 695, 636 N.Y.S.2d at 740.

The LPA contains no such language. While Catskill Development's obligation to "sell" the land and the Tribe's obligation to "purchase" the land was contingent upon the United States' decision to accept the land into trust, BIA approval was not a condition precedent to the validity of the entire LPA.[49] The Agreement was fully executed was binding on both parties. It contains provisions which obligate the Tribe to use its best efforts to help obtain approval for the trust-transfer. (*See Carpinello Aff.* at Ex. A at §§ 8.01, 8.02.) It is a clear example of a contract where the parties' performance is conditioned on the governmental approvals, rather than one where the agreement itself is so conditioned. *See Buffardi v. Parillo*, 168 A.D.2d 812, 813, 563 N.Y.S.2d 948, 950 (3d Dept 1990).

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[49] This conclusion does not require any change in my previous holding that the Shared Facilities Agreement, the language of which does create a condition precedent to the validity of the contract. Section 15.15 states that the Agreement "shall become effective, of full force and effect and the parties hereto shall be bound hereby, on the Effective Date (as defined in the Management Agreement)." (*Carpinello Aff.* at Ex. D at 25.) The Effective Date in the Management Agreement is "the date on which the Chairman of the NIGC grants written approval" of the Management Agreement." (*Id.* at Ex. C at 3.) Thus, at the time of Park Place's alleged interference, the Shared Facilities Agreement was not in force.

The cases cited by defendant do not require any other conclusion. The contract at issue in *Cauff, Lippman & Co. v. Apogee Finance Group, Inc.*, 807 F. Supp. 1007 (S.D.N.Y. 1992), included a condition requiring KLM Supervisory Board approval for the transaction. *Id.* at 1017. The court nevertheless found, based on the language in the contract, that the parties intended to form a valid contract. The contract stated that it "constitute[s] a binding agreement between [Cauff, Lippmand] and [Apogee] with respect to this transaction." *Id.* at 1020. The Court held that "such language strongly suggests that the parties intended to form a binding contract obligating each party to negotiate in good faith to finalize all remaining terms in a manner consistent with the agreed upon terms. . . . The inclusion [of] the . . . . condition precedent . . . is not inconsistent with an intention to enter into a binding contract." *Id.*

In Office of the Comptroller General of the Republic of Bolivia on behalf of *Bolivian Airforce v. Int'l Promotions & Ventures, Ltd.*, 618 F. Supp. 202, 207 (S.D.N.Y. 1985), the court held that failure to obtain a government license for the object of the contract rendered the contract void. Again, however, this conclusion was based on the language of the contract, which explicitly conditioned validity on procuring the license. It stated that "the present contract will become effective once the following requirements have been complied with," and listed as one of the requirements the following: "Four.—The transfer license of the goods, object of the present contract, has been [obtained] by 'THE SELLER' [defendant] in the United States of America, within the maximum deadline of thirty (30) days, computed from the time the present document was subscribed [*i.e.* September 30, 1981]." *Id.* at 204. Again, no such language in the

LPA conditions the validity of effectiveness of the contract on BIA approval.

Thus, upon reconsideration, defendant's motion to dismiss plaintiff's claim for tortious interference with the LPA is denied.

3. Catskill Development's Request To Review The Dismissal Of The Claim For Tortious Interference With The Gaming Management Agreement Is Denied

In yet another footnote, Catskill Development also seeks to reargue the motion to dismiss the claim for tortious interference with the Management Agreement. Plaintiff Mohawk Management is the only plaintiff who was a party to the Management Agreement, and as such is the only party who could recover for tortious interference with this Agreement. Mohawk Management did not move for reconsideration of this holding. So I am constrained to ignore Catskill Development's suggestion that I reopen the matter.

Furthermore, even if the request for reconsideration were properly before the Court, I would not change my conclusion that the Management Agreement is void for lack of NIGC approval. Plaintiff argues that the provisions in IGRA which operate to void unapproved management contracts were intended for the protection of tribes, and as a matter of equity, should not be used to benefit a wrongdoer by shielding it from liability for its own fraud. In support, plaintiff cites *Tri-Millennium Corp. v. Jena Band of Choctaw Indians*, 725 So. 2d 533 (La. App. 1998). In that case, the court denied the Tribe's defense of no cause of action and enjoined the Tribe from negotiating a casino project with any other parties. *Id.* at 538. The court allowed plaintiffs' claims

to proceed in spite of the fact that the contract between plaintiffs and the Tribe may have been void under section 81 or the IGRA. What Catskill Development fails to note, however, is that the court in *Tri-Millennium* found that plaintiffs had stated causes of action for conversion, unjust enrichment and fraud, and could therefore proceed with their request for injunctive relief despite the fact that they did not have a claim for breach of contract. *Id.* at 537-38. *Tri-Millennium* therefore has no applicability to this case.

CONCLUSION

For the reasons discussed above, plaintiff's motion for reconsideration is granted, and defendant's motion to dismiss the claim for tortious interference with the Land Purchase Agreement is denied. Portions of the May 14 opinion are vacated as discussed above.

Dated: July 23, 2001

Colleen McMahon

U.S.D.J.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 8660 (CM)(GAY)

CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., AND MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C.,
Plaintiffs,

against

PARK PLACE ENTERTAINMENT CORP.,
Defendant.

May 14, 2001, Decided

OPINION

JUDGES: Colleen McMahon, U.S.D.J.

OPINION BY: Colleen McMahon

MEMORANDUM AND DECISION GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Plaintiffs Catskill Development, L.L.C. ("Catskill"), Mohawk Management, L.L.C. ("Mohawk") and Monticello Raceway Development Co., L.L.C. ("Monticello") (collectively, the "Catskill Group"), bring this action in diversity against Park Place Entertainment Corp. ("Park Place"), claiming tortious interference with contractual relations, interference with prospective business relationships, unfair competition, and violations of the Donnelly Act, N.Y. Gen.

Bus. Law § 340. Plaintiffs allege that defendant, one of the world's largest casino companies, wrongfully induced officials of the St. Regis Mohawk Nation ("Mohawks") to terminate the Mohawks' contractual agreements and business relationships with plaintiffs relating to the development and management of a proposed $500 million Native American casino at the Monticello Raceway in Sullivan County, New York (the "Casino Project").

The case is before me on defendant's motion to dismiss. For the reasons below, I grant defendant's motion to dismiss plaintiffs' claims for tortious interference with contractual relations, for unfair competition, and for violations of the Donnelly Act. The motion to dismiss plaintiffs' claim for interference with prospective business relations is denied.

I. BACKGROUND

The factual allegations below are taken from plaintiffs' complaint and documents relied on within or attached to the complaint.

A. Tribal Gaming in New York

Casino gambling is illegal in New York State. However, a federal statute, the Indian Gaming Regulatory Act ("Gaming Act" or "IGRA"), 25 U.S.C. § 2701–2721 (1988), permits different types of gaming, including casino gambling, on Native American land under specified conditions.

The act classifies gaming activities into three different categories. Tribes have exclusive jurisdiction over Class I gaming, which includes social games and traditional forms of Indian gaming connected to tribal ceremonies. 25 U.S.C. §§ 2703(6), 2719(a)(1). Class II gaming, defined by the Gaming Act to in-

clude "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . ," are regulated by the National Indian Gaming Commission (NIGC).[50] All other gaming activity (including both electronic gaming devices and traditional casino games, such as card tables, craps, roulette, and slot machines) is Class III gaming.

The Gaming Act permits Native American tribes to petition the Governor of their host state for a so-called "compact" that would allow Class III gaming on reservation lands and/or on lands to be acquired and held in trust by the United States Government for the benefit of the tribe. 25 U.S.C. § 2710(d)(3). These compacts define which types of Class III gaming activities the Tribes can conduct, and usually provide that a portion of the gaming revenues will go to the State. (Compl. at 26-28.) Any compact between the state and the Tribe must be approved by the Secretary of the Interior. § 2710(d)(3)(B).

To date, only two tribes in New York have successfully petitioned the Governor for compacts: the Oneida Nation received its compact in 1992, and the St. Regis Mohawk Tribe in 1993. The Oneidas opened a casino in western New York, near Syracuse, and sometime after 1996, the Mohawks opened a small casino on their Akwesasne Reservation near the Canadian border. (Compl. at 26-30.) *See also* Hearing on Indian Gambling Before the Senate Comm. on Indian Affairs, 1994 WL 377835 (F.D.C.H. July 19, 1994)

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[50] Class I and II gaming activities are not at issue in the present case.

(statement of Ray Halbritter, Nation Representative, Oneida Indian Nation of New York); Robert D. McFadden, Cuomo Accepts Mohawk Plan for a Casino, N.Y. Times, Oct. 16, 1993, at I25; James Dao, Accord Signed for a Casino in New York State, N.Y. Times, Mar. 11, 1993, at B1.

In May 1999, the Mohawks' amended their compact with New York State to allow for the use of electronic gaming devices on the Akwesasne reservation casino. This authorization was set to expire on May 27, 2000. Defendant contends that the State and the Mohawks negotiated another electronic gaming amendment, which would be effective until May 27, 2005. (*See Carpinello Decl.* at Ex. 5.) They claim, however, that the amendment was twice rejected by the Secretary of the Interior, and is not currently in effect. (*See Carpinello Decl.* at Ex. G.) Plaintiffs do not dispute this. They argue, however, that while such an amendment "would have added electronic terminals," it would not have precluded approval of the [agreements made between Catskill and the Tribe] and Catskill's legal ability to open the [Monticello] facility. The agreements . . . do not legally require electronic terminals." (Mem. in Opp. to Def.'s Mot. to Dismiss at 25.) As the parties have not provided a copy of the existing compact between the Mohawks and New York State, I can not determine whether the compact would have to be amended in order for the Mohawks to even build a new casino somewhere other than on the Akwesasne reservation. However, it is clear that without an amendment, no Mohawk casino, whether at Monticello or somewhere else, could run electronic games.

In a decision of some significance to this case, New York State Supreme Court Justice Joseph C. Teresi

held, on April 20, 2001, that because the New York State Constitution does not grant residual powers to the executive to bind the State to an Indian Gaming Compact, the Governor of New York was not empowered to enter into these compacts without legislative concurrence.[51] *Saratoga County Chamber of Commerce, Inc. v. Pataki*, Index No. 11971-99 (Sup. Ct. N.Y., April 10, 2001). Accordingly, Justice Teresi declared the 1993 Compact signed by the Governor and the Mohawks void and unenforceable. Moreover, Justice Teresi enjoined the Governor from entering into any future gaming compacts without prior legislative concurrence.

B. The Catskill Deal

In 1995, leaders of the Mohawk tribe opened discussions with Sullivan County businessmen who were looking to develop a gambling facility, using the Monticello Raceway in Monticello, New York, as a cornerstone for the operation. In October 1995, these businessmen formed Catskill to pursue the Casino Project and seek federal approval for the plan. (Compl. at P 33-37.) Catskill planned to donate 30 acres to the Tribe, which would transfer the land to the U.S. Government to hold in trust for the Mohawks. Catskill would help the Mohawks operate the casino, and in return take a share of the revenues.

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[51] Justice Teresi concluded that neither the IGRA nor the level of permitted legal gambling activity in New York "has in any way amended New York Law." *Saratoga County Chamber of Commerce, Inc.*, at 8. This is consistent with other courts' analysis of the IGRA. *See Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1296 (D.N.M. 1996) (finding evidence in legislative history that Congress did not intend that the Secretary's approval override deficiencies in the compact under State law), *aff'd* 104 F.3d 1546 (10th Cir. 1997).

Catskill acquired the Monticello Raceway for $10,000,000 on June 3, 1996. Of the real property purchased, 29.31 acres adjacent to the Raceway were set aside for the casino. Catskill created Mohawk Management, a subsidiary of Alpha Hospitality, Inc., to provide technical and financial expertise to assist the Mohawks in obtaining financing and to manage, operate, and maintain the casino. Catskill also created Monticello Raceway Development to develop the casino property, and to assist the Mohawks in obtaining a loan to finance the construction, equipping, and operation of the casino. As the coordinating entity, Catskill acted for all plaintiffs in seeking the necessary local, state and federal approvals needed to build and operate the casino. (Compl. at 38-42.)

On July 31, 1996, the Mohawks and plaintiffs allegedly entered into a number of agreements, which plaintiffs claim were re-executed and affirmed a number of times through the year 2000 (although they do not attach copies of those agreements to the complaint). The agreements are as follows:

(1) A Land Purchase Agreement between the Regis Mohawk Gaming Authority and Catskill Development contemplating the transfer of the Raceway property from Catskill to the United States government to be held in trust for the Mohawks, in exchange for which the Mohawks would pay Catskill $10 million, the purchase price of the property. (*Carpinello Aff.* at A.

(2) A Mortgage Agreement which would, upon execution, provide for a mortgage on the Mohawks' leasehold of the subject property. Defendant provides in its papers an unsigned copy of this agreement, claiming that it was never executed because it was dependent on the consummation of the land transfer

described in the Land Purchase Agreement. Plaintiffs do not dispute that this agreement was never executed. (*Id.* at B.)

(3) A Gaming Facility Management Agreement granting Mohawk Management LLC the exclusive right to manage the day-to-day operations of the contemplated casino. Under the agreement, the parties are to establish a Management Business Board, with two members from Mohawk Management and two from the Tribe, to oversee the operations. Any action by the Board requires three of the four members to agree. Under the agreement, Mohawk Management is to negotiate and to enter into contracts for operation of the casino on behalf of and in the name of the Tribe, although contracts over $25,000 must be approved by the Board. The Tribe agrees to pay Catskill 35% of Net Revenues. (*Id.* at C.)

(4) A Shared Facilities Agreement between the Tribe and Catskill Development, LLC, under which the Tribe agrees to develop and build the casino, and Catskill agrees to improve and operate the racetrack. The agreement establishes a Shared Facilities Business Board, with the same representation and voting rules as the Management Business Board described above. (*Id.* at D.)

(5) A Development and Construction Agreement between the Tribe and Gaming Authority on one side, and Monticello Raceway Development Company, LLC on the other, in which the Tribe grants the developer the right to plan and to build the casino, and the developer agrees to help the Tribe obtain financing for the construction. The agreement establishes a Development Business Board consisting of the same members as the Management Business Board, to approve certain aspects of the project, such as the

budget and the choice of architect. The agreement was signed by the Gaming Authority, the Tribe, and the Monticello Raceway Development Company. (*Id.* at E.)

C. Federal and State Approval of Indian Gaming

The contemplated casino project between plaintiffs and the Mohawks was subject to regulatory approval by the Federal Government, and as discussed above, by New York State. Defendant argues that certain of the required approvals affect the validity of the agreements signed by plaintiffs and the Mohawks, in that the agreements could not become legally binding contracts without those approvals.

1. IGRA

The primary statute regulating Indian gaming is the IGRA. As explained above, the IGRA allows Indian tribes to conduct gaming operations on reservation lands and, under certain circumstances, on "off-reservation" lands. The Act established the National Indian Gaming Commission (NIGC) to regulate Indian gaming.

Under the Act, gaming management contracts[52] for Class III gaining must now be approved by the Commissioner of the NIGC. 25 U.S.C. §§ 2705(a), 2711(b). Regulations passed pursuant to the IGRA state that such contracts "shall become effective upon approval by the Chairman," 25 C.F.R. § 533.1, and that a gaming management contract not approved by

[52] "Management contract" is defined as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor is such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15.

the NIGC is void. 25 C.F.R. § 533.7. *See also International Gaming Network v. Casino Magic Corp.*, 120 F.3d 135 (8th Cir. 1997) (noting that agreement to build and manage casino on tribal land was not binding on parties because it lacked NIGC approval); *Casino Resource Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 2001 WL 242191 (8th Cir. 2001). In addition, collateral agreements[53] to the management contract that relate to Indian gaming must also be approved, and are thus void without approval. 25 U.S.C. § 2711(a)(3). *See also U.S. ex. Rel. Mosay v. Buffalo Bros. Mgmt.*, 20 F.3d 739, 743 (7th Cir. 1994) (explaining effect of IGRA on contracts with Indian tribes).

A separate section of the IGRA describes the approval process for planned "off-reservation" gambling projects on lands to be transferred and held in trust by the U.S. for the benefit of a tribe. Such a project must be expressly authorized by the Secretary of the Interior. IGRA § 20, 25 U.S.C. § 2719(b)(1)(a). *See also Keweenaw Bay Indian Cmty. v. United States*, 136 F.3d 469, 474 (6th Cir. 1998). The Section states that gaming shall not be conducted "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," unless certain limited conditions are met. 25 U.S.C.A. § 2719(a).

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[53] Collateral agreements are defined as "any contract, whether or not in writing, that are related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.15.

Under the exceptions to § 2719(a), gaming on newly acquired trust lands may be conducted when:

> the Secretary, after consultation with the Indian tribe and appropriate State, and local officials . . . determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian Tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. . . .

25 U.S.C. § 2719(b)(1)(A) Unlike Section 2711, there is no regulation related to Section 2719 which explicitly states that contracts creating off-reservation gambling projects are void without the Secretary's approval.

2. Section 81

Defendant argues that the agreements at issue in the present case also implicate an earlier statute relating to contracts with Indian parties, 25 U.S.C. § 81. Under Section 81, non-Indian parties contracting with Indian tribes must submit certain contracts to the Secretary of the Department of the Interior (through the Bureau of Indian Affairs) for approval. Contracts requiring approval under Section 81 and not approved by the BIA are invalid. *See Green v. Menominee Tribe of Indians in Wisconsin*, 47 Ct. Cl. 281, *aff'd* 233 U.S. 558, 58 L. Ed. 1093, 34 S. Ct. 706 (1914).

At the time plaintiffs made their agreements, and until March 14, 2000, when Section 81 was amended, the statute read:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not

> citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> . . . .
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . . . All contracts or agreements made in violation of this section shall be null and void.

25 U.S.C. § 81 (1958) (emphasis added), amended by 25 U.S.C. § 81(a)-(e) (2000).

Prior to amendment, there was significant litigation on the question of which contracts were for "services relative to Indian lands" falling within the purview of Section 81. Some courts, analyzing whether a management contract between a tribe and an outside party was sufficiently related to Indian lands, applied the fact-specific inquiry used in *Altheimer & Gray v. Sioux Mfg. Corp*, 983 F.2d 803, 812 (7th Cir. 1993)[54] ; *Penobscot Indian Nation v. Key Bank of*

[54] The factors used in *Altheimer* to determine whether a particular contract is relative to Indian land are: (1) whether the contract relates to the management of a facility located on In-

Maine, 112 F.3d 538, 552 (1st Cir. 1997); *U.S. ex rel. Mosay v. Buffalo Bros. Mgmt., Inc.*, 20 F.3d 739 (7th 1994); *See also In re U.S. ex rel. Hall*, 825 F. Supp. 1422, 1433 (D. Minn 1993) (applying *Altheimer* to non-management contracts), *aff'd* 27 F.3d 572, *cert. denied* 513 U.S. 1155, 115 S. Ct. 1112, 130 L. Ed. 2d 1076. But *See U.S. ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms*, 2000 DSD 7, 102 F. Supp. 2d 1154, 1161 (D.S.D. 2000) (*declining to apply Altheimer*).

Many parties contracting with an Indian tribe could not be certain approval was required unless and until the question was fully litigated. Thus, because of the harshness of the penalty (invalidation), most contracts, regardless of whether they fell within Section 81, were submitted to the BIA for Section 81 approval. *See* S. Rep. No. 106-150, Encouraging Indian Economic Development, To Provide for the Disclosure of Indian Tribal Sovereign Immunity in Contracts Involving Indian Tribes, and for Other Purposes, Sept. 8, 1999, at 5-7 (hereinafter "Senate Report").

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dian lands; (2) whether the contract grants non-Indians the exclusive right to operate the facility. (3) whether the contract forbids the tribe from encumbering the property; and (4) whether the validity of the depends upon the legal status of tribes as a separate sovereign. *Altheimer*, 983 F.2d at 807. No one factor is a *sina qua non* of finding that Section 81 applies. *Id.* at 811, (quoting *Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247, 109 S. Ct. 7, 101 L. Ed. 2d 958 (1988)). Since most management contracts contain all of these elements in varying degree, Section 81 required Secretarial approval for the majority of these agreements. *See* 25 U.S.C. § 81; *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.*, 616 F. Supp. 1200, 1209 (D. Minn. 1985).

The statute was amended in part to address this problem and to provide more guidance on the types of contracts that must be approved in order to be valid. *See Id.* It now reads:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract, bears the approval of the Secretary of the Interior or a designee of the Secretary.

25. U.S.C. § 81(b) (2000). The Senate Report on the bill discussed the types of contracts that should not come within Section 81. By replacing the phrase "relative to Indian lands" with "encumbering Indian lands," it explained that the bill will:

> no longer apply to a broad range of commercial transactions. Instead, it will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands.

Senate Report at 9. The statute requires the Secretary to develop regulations specifying the types of contracts that fall within Section 81. As of the date of this opinion, no such regulations exist.

3. Relationship between the IGRA and Section 81

Indian gaming has been subject to regulation under both Section 81 and the IGRA.

Prior to passage of the IGRA, certain management contracts for Indian gaming establishments were held to be subject to Section 81's invalidation provision. *See generally Barona Group of Capitan Grande Band of Mission Indians v. American Mgmt. &*

Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986); *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300 (D.D.C. 1987); *Shakopee Mdewakanton Sioux Cmty. v. Pan American Mgmt. Co.*, 616 F. Supp. 1200 (D. Minn. 1985), dismissed on other grounds, 789 F.2d 632; *Wisconsin Winnebago Bus. Comm. v. Koberstein & Ho-Chunk Mgmt.*, 762 F.2d 613 (7th Cir. 1985). *See also Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enter. Mgmt. Consultants, Inc.*, 734 F. Supp. 455 (W.D. Okla. 1990) (IGRA held not to apply) Although these holdings were very fact specific, the inquiry usually centered on the level of control the tribe retained over the operations.

At least in part, the IGRA was passed in response to the uncertainty over these holdings. Congress noted in the text of the statute that "federal courts have held that [Section 81] requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts." P.L. 100-497 (1988). *See also* Senate Report at 5-7. Thus, as one court has explained:

> When section 81 is read in conjunction with the [IGRA], two distinct, successive regulatory regimes can be seen. One is administered by the [BIA] under section 81, the other by the [NIGC] under the [IGRA]. In the first regime, contracts relating to Indian lands, including casino management contracts, must be submitted to the Bureau for approval under criteria undefined by statute or regulation; failure to submit exposes the contractor to the fell sanction of a *qui tam* suit. In the second regime, a class of contracts—casino management contracts—are carved out of

> section 81 and subjected to the exclusive regulatory authority of the new Commission administering the new Act, along with certain contracts—contracts collateral to casino management contracts—that never were subject to section 81. 25 U.S.C. § 2711(a)(3); 25 C.F.R. § 502.5.

U.S. ex rel. Mosay v. Buffalo Bros. Mgmt., Inc., 20 F.3d 739, 743 (7th Cir. 1994). Congress expressly reaffirmed the NIGC's obligation to approve gaming management contracts when it amended Section 81. 25 U.S.C. § 81(f)(2) (Supp. June 2000) (stating that nothing in Section 81 "shall be construed to amend or repeal the authority of the [NIGC] under the [IGRA]")

The court in *Mosay* questioned the continuing applicability of Section 81 to Indian gaming management contracts, and to other agreements that fall within the IGRA:

> We doubt that the *qui tam* provision of section 81 remains applicable to contracts now governed by the Indian Gaming Regulatory Act. Contractors would be subject to enormous legal risk that one of their contracts with an Indian tribe might be held to be a collateral agreement that they should have but failed to file, in which event they would have to repay everything they had received under the contract. *Qui tam* liability would expand indefinitely at the very moment that Congress had created a new administrative remedy and vested its enforcement in a new, specialized agency with its own detailed, measured, modern set of remedies.

Mosay at 743; *See also Wisconsin Winnebago*, 762 F.2d at 619 (holding that "section 81 governs transac-

tion relative to Indian land for which Congress has not passed a specific statute.").

D. Efforts to Obtain Approval of The Monticello Casino Project

In 1996, Catskill and the Tribe sought BIA approval of the application to place the Monticello Raceway property into trust for the benefit of the Tribe (the "land-into-trust" transfer). The Acting Area Director of the Eastern Area Office of the BIA ("EAO") approved Catskill's application in December 1998. The Director transmitted his findings and conclusions to the Indian Gaming Management Staff ("IGMS"), a department of the BIA. In February 1999, the Deputy Commissioner of Indian Affairs advised the EAO that she disagreed with the Regional Director's recommendation. Catskill and Mohawk representatives worked with federal officials to address BIA's concerns, and on October 29, 1999, the Mohawks requested that BIA again review its application. On December 14, 1999, they submitted revised agreements related to the Casino Project. Plaintiffs and the Mohawks continued to push for approval, and made changes to the proposal as requested by BIA.

On April 6, 2000, the Assistant Secretary for Indian Affairs wrote to Governor Pataki:

> The Department has completed its review of the Tribe's application. Based on the application and its supporting documentation, including the comments received from State and local government officials, and officials of nearby tribes, the Department has made findings of fact supporting the two-part determination required under Section 20(b)(1)(A) of IGRA. Based on these find-

> ings, I have determined that a gaming establishment on the 29.31 acre-parcel of land located in Monticello, New York, would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. . . . Pursuant to Section 20 of IGRA, I seek your concurrence in this determination.

(Compl. at Ex. H.)

According to Plaintiffs, the Mohawks had every reason to believe the Governor's concurrence would be readily procured. In support of this assertion, they point to two documents. The first is a March 14, 2000 letter from John F. O'Mara, the Governor's advisor on Indian casino issues and Indian land claims, to Robert A. Berman of Catskill. After taking "strenuous exception" to unidentified comments from plaintiff in an earlier letter, O'Mara continues:

> Let me assure you that any decisions which Governor Pataki makes with respect to the issue of casino gambling in New York will be made only in the best interests of the citizens of New York State. The Governor has expressed his strong support for a casino in the Catskills and I am confident that when the St. Regis Mohawks have obtained federal permission the Governor will respond expeditiously.

(Compl. at Ex. E.) Plaintiffs also point to a June 15, 1999 letter, purportedly signed by Governor Pataki and written to the Supervisor of the Town of Thompson in Monticello, which stated in part:

> Naturally, it has always been my goal to encourage all economic development strategies that will help ensure that Sullivan County and the City of Monticello enjoy the same economic resurgence

> that is taking place elsewhere throughout the State. Certainly, one project that show tremendous potential is the St. Regis Mohawk Tribe's proposal to establish an off-reservation casino at the Monticello Raceway.

(Compl. at Ex. F.) Referring to a recent agreement between the State and the Tribe to allow video lottery games at the Akwesasne casino, the Governor said:

> I believe this historic agreement marks the beginning of a new partnership, forged in the spirit of cooperation, which will smooth the path for other mutually beneficial agreements between our governments in the future.

(*Id.*). Pataki then confirmed the Town Supervisor's understanding that the Tribe's application for federal approval was still pending, and added:

> It is also my understanding that the Mohawk Tribe and the management company, Catskill Development, have now provided the additional information that was requested by BIA. Assuming the BIA's final determination is favorable, I am prepared to attempt to negotiate in good faith an amendment to the St. Regis Mohawk Tribe's gaming compact for an off-reservation casino at the Monticello Raceway in Sullivan County.

(*Id.*)(emphasis added)

As noted above, the gaming compact had to be amended. At the very least, the amendment would have to allow for electronic gaming at the Raceway site, although it may have to be amended to allow Class III gaming of any kind at the Raceway—again, without a copy of the original compact, I cannot be

sure. However, nothing in the text of Section 2719, under which the BIA approved the land-into-trust application, requires that an amended compact be in place in order for the Governor to provide his concurrence. Nevertheless, it appears from the letter cited above that Pataki intended to link renegotiation of the compact to his concurrence with the BIA. Regardless of what remained to be negotiated between the Tribe and the Governor, it is undisputed that Pataki did not, and at the time of this opinion still has not, made any such response to the BIA's recommendation that the land-into-trust application be approved.

Neither party has provided the Court with any information on whether the Tribe and Catskill had begun the process of seeking approval for the management contract, which had to be approved by the NIGC under 25 U.S.C. § 2711. However, it is undisputed that no such approval was given.

E. Park Place's Alleged Involvement

Plaintiffs claim that the reason the project was never approved is because they were sabotaged by defendant's efforts to scuttle the Monticello Raceway casino project. By mid-1999, when according to plaintiffs it "became clear" that both the Federal Government and the Governor favored the casino project, Park Place principals allegedly sought an introduction to the Mohawks through former Senator Alfonse D'Amato, who was "acting as a consultant to Park Place." D'Amato introduced Park Place executives Goldberg and Cummis to Ivan Kaufman, CEO of Presidents Resorts Casino, Inc., ("Presidents"), the company that managed the Mohawk's small Akwesasne casino. The Mohawks owed the State of New York millions of dollars from the operation of the ca-

sino, which was losing money every month. Park Place allegedly feigned an interest in that casino in order to become involved with the Mohawks, and that it deliberately held out a false promise of financing to Presidents in exchange for an introduction to the Tribe. Later, after gaining the confidence of the Mohawk chiefs, Goldberg and Cummis "began to link Park Place's financial commitments to the Akwesasnse casino to participation by Park Place in the Casino Project itself." As part of their efforts, plaintiffs complain that Goldberg and Cummis intentionally maligned Presidents and plaintiffs and to "actively advise the Mohawks to break their contract with Plaintiffs." (Compl. at 84–90.)

On April 11, 2000, Cummis wrote to Kaufman, forswearing any commitment to the Akwesasne casino:

> Since I talked to you last, our financial due diligence has been on-going and is now complete. As a result of our financial due diligence, it would appear that the actual debt of the Tribe arising from the casino operation is substantially in excess of what we thought it was and we learned for the first time that there is more than $3 million owing to the State of New York. Our financial people have indicated that they do not think our investment in this facility makes any sense whatsoever. They estimated potential losses over the term of the contract to be as high as $40 million.
>
> As you know, the only reason that we were interested in discussing with you any investment in the Akwesasne Casino is for the potential of an investment in a Class III Casino in the Sullivan County region.

> While we remain interested in the possibility of a Sullivan County Class III casino with the Mohawks, we have also determined that they have a written agreement with the group from the Monticello racetrack. We strongly believe that the written agreement is not enforceable and we are reviewing the issues now.

(Compl. at J.)

Plaintiffs allege that, in spite of the letter, Cummis met the very next day with the Governor's counsel, Patrick Kehoe, ostensibly to discuss Park Place's potential management of the Akwesasne casino. (Compl. at Ex. K.) At this meeting, Cummis allegedly learned from Kehoe that the Governor was preparing to concur with the BIA regarding the Monticello casino project.

When the Mohawks' Tribal Administrator asked Catskill about potential involvement of Park Place in the project, Catskill allegedly informed the Tribe that it was not interested in any "partners" whose motives it could not determine and who might actually be adverse to the project. Plaintiffs allege that on April 13, 2000, the Tribal Administrator told a Catskill representative that the Mohawks had been advised by Cummis that he had met with the State, and that the Governor would not approve the Casino Project without Park Place's involvement.

Plaintiffs assert that Cummis and Goldberg flew to the Mohawk reservation on April 14, 2000, with the intent to "steal the Mohawks from plaintiffs and destroy the Casino Project before the release of the Governor's concurrence letter." Defendant allegedly told the Tribal Council that Pataki would not approve the Casino Project without Park Place's in-

volvement and falsely represented that the State was about to shut down the Akwesasne casino for unpaid revenue sharing fees. Plaintiffs also allege that defendant intentionally misrepresented to the Mohawks that the federal approval granted to Catskill was "portable"; that a casino project on another site would actually be approved within four months, rather than three to four years; that Catskill and its principals were "unsuitable"; that the Mohawks' agreements with plaintiffs were not validly authorized or properly executed by the Mohawks; and that plaintiffs could not get NIGC approval. (Compl. at 101–106.)

On April 14, 2000, the Tribe entered into a written agreement with Park Place, which set forth "certain understandings" reached between the parties, namely, that (1) Park Place will be the exclusive developer and manager of any Mohawk casinos in New York State; (2) the Mohawks will receive 70% of profits after paying back Park Place for "advances" for the cost of development and construction; (3) Park Place will begin construction within 36 months of the agreement unless otherwise agreed by the parties; and (4) Park Place will pay the Mohawk's $3 million and indemnify the Tribe from litigation losses resulting from the Tribe's termination of its agreements with plaintiffs.[55] This document was signed by

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[55] Pertinent parts of the text of this unusual agreement are set out below:

> [Park Place] will be the exclusive developer of any such Class II and/or Class III casino for the State of New York (excluding [the Akwesasne and one other potential project]) under a development agreement to be entered into hereafter in good faith by the parties;
>
> [Park Place] will also be the Manager of any such . . . casino . . . along terms substantially similar to those set

forth in the purported Gaming Facility management Agreement between the Tribe and Mohawk Management, LLC, . . . except that as an essential term of such any [sic] agreement [Park Place] will have an initial term of seven (7) years. [Park Place] and the Tribe will have a profit distribution of 70% to the Tribe and 30% to [Park Place].

All of the foregoing is subject to the approval of NICG.

[Park Place] will provide the financing necessary to construct such casino facilities. [Park Place] agrees that construction of a gaming facility will commence within thirty-six (36) months of this agreement unless otherwise extended by written consent of the Tribe. The Tribe's portion of the casino profits shall be utilized to pay back [Park Place's] advances. Such payback shall be completed within the seven (7) year term or less without penalty or any agreed upon extension of such term.

. . . .

In consideration of the foregoing, [Park Place] will pay to the Tribe the sum of $3 million for use by the Tribe in it's discretion. Such payment will be made as soon as reasonably possible after full execution of this agreement and shall be paid back to [Park Place] only in the event that the Tribe does not or is unable to enter in the development, management and licensing agreements set forth above; and

Both parties understand that there exists between the Tribe and Mohawk Management, LLC a purported Gaming Facility Management Agreement signed on July 31, 1996. Both the Tribe and [Park Place] believe such agreement is unenforceable and of no force and effect for, among other reasons, (1) it is subject to the approval of the NIGC, which approval has not been granted; and (2) there are serious questions as to whether the signatories on behalf of the Tribe to the agreement had the legal right and/or capacity to enter into such agreement and bind the Tribe. [Park Place] also understands the Tribe's legal position with respect to the unenforceable agreement and agrees that it will indemnify the Tribe against any litigation resulting from the Tribe entering into this Agreement with [Park Place] in substitution with the

the "Three Chiefs" of the Tribe (Smoke, Ransom, and Thompson), three sub-chiefs, and Park Place President and CEO Arthur Goldberg. (Compl. at Ex. M.)

After the agreement with Park Place was signed, plaintiffs also describe numerous alleged actions by Park Place and the Mohawks to interfere with or to prevent plaintiffs from striking a new deal with another tribe to use the property at the Monticello Raceway.[56] (Compl. at 118–131.)

F. Tribal Divisions and The Tribal Court Suit Against Park Place

At the time of these machinations, the tribal chiefs were involved in a political struggle for control of the Tribe, which historically had been governed by a "Three Chiefs" system. *See Park Place Entm't v. Arquette*, 113 F. Supp. 2d 322 (N.D.N.Y. 2000) (providing background on the current divisions within the St. Regis Tribe as they relate to a tribal court suit brought by former chiefs and other tribal members against the Three Chiefs and Park Place, and finding that the federal district court lacked subject matter

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Tribe's prior understanding with the developers of a proposed casino at the Monticello Race Track.

[56] Plaintiffs also allege that Park Place, "for a brief period of time," collaborated with Donald Trump and his organization to defeat the casino project. They also allege that Park Place principals Arthur Goldberg and Clive Cummis, along with Trump, sought the assistance of New Jersey Senator Robert Torricelli in this endeavor. They also refer to a "legal challenge" to the Governor's authority to amend the compact with the Mohawks that Plaintiffs' claim was "secretly orchestrated" by Trump and two "disinterested" New York legislators, and to "smear campaigns" instituted against the Governor, Catskill's principals, and the Mohawks by a non-profit group called the "New York Institute for Law & Society."

jurisdiction to enjoin the tribal court proceeding). In 1995, the Tribe held a referendum on whether to abandon the Three Chiefs system and to adopt a new Tribal Constitution, which would create three branches of tribal government, including a Tribal Court. The Constitution provided for its own adoption with 51% of the voting tribal members. *Id.* The Tribal Clerk allegedly certified that 50.935093% of those voting were in favor of adopting the Constitution, yet certified that the Constitution was adopted by the requisite vote. *Id.* at 322-23. In June 1996 the Tribal Council rescinded the certification of the Constitution following a second referendum. At the end of June, in a third referendum, the Tribe allegedly voted to elect Ransom, Smoke and Thompson in a "clean slate" of Chiefs, rather than retain the current Tribal Council officials. However, not all of the Tribe accepted the results of this referendum.

On April 26, 2000, independent representatives of the Mohawk Tribe (including prior chiefs), filed a class action complaint in the St. Regis Mohawk Tribal Court against Park Place, Goldberg and Cummis, and the Three Chiefs who signed the agreement, asking the Court to nullify the agreement and seeking billions of dollars in damages. Soon after the complaint was filed, the Three Chiefs declared the Tribal Court invalid, raided the Court facilities, and removed the Court's computers and files. (Compl. at 116.) On June 2, 2000, Park Place brought suit in the Northern District of New York seeking: (1) an injunction against the Tribal Court proceeding and (2) a declaration that the Tribal Court was invalid and without authority to adjudicate the claims asserted. On September 18, 2000, Judge McAvoy dismissed Park Place's action for lack of subject matter jurisdiction. *Park Place Entm't Corp.*, 113 F. Supp.

2d at 323 (noting that "significantly, the dispute does not involve a question of the limits of the Tribal Court's jurisdiction, but rather a question of whether the Tribal Court is a valid Tribal authority.") As of the date of this opinion, Park Place had appealed the district court's dismissal to the Second Circuit.

On March 20, 2001, the Mohawk Tribal Court entered a default judgment against Park Place and the other defendants in that case, and awarded $1.782 billion in actual damages and $5 million in punitive damages to plaintiffs. The Court sets forth findings of fact and conclusions of law regarding the validity of the contracts and the actions of Park Place and Catskill. *See* Arquette *v. Park Place Entm't Corp.*, Case No. 00C101333GN, Mar. 20, 2001 (St. Regis Mohawk Tribal Court, Hogansberg, NY). Park Place has advised the Court that it views this judgment as a nullity—a position it hopes will be sustained by the Second Circuit.

II. CONCLUSIONS OF LAW

A. Jurisdiction

The parties to this case have established diversity jurisdiction. However, in light of the St. Regis Mohawk Tribal Court's ruling, I will briefly address whether this Court can or should retain jurisdiction over this case, or whether the parties are precluded from litigating any issues decided in the Tribal Court matter.[57]

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[57] The Court learned of the Tribal Court ruling after all briefing on defendant's motion was complete. By letter dated March 23, 2001, the Court invited the parties to submit comments on what effect, if any, the Tribal Court action has on this lawsuit. Both sides responded on March 28 by letter brief. Plaintiffs argued that collateral estoppel bars relitigation of whether en-

1. Comity Does Not Require A Stay of Proceedings Pending Final Appeal Of The Tribal Court Action

If personal and subject matter jurisdiction exists, a federal court may stay proceedings, or dismiss the case pending exhaustion of tribal remedies, as a matter of comity. If there is a tribal court that has, or may have, jurisdiction, the federal policy supporting tribal self-government supports deferring to the tribal court, particularly on issues of tribal court jurisdiction. *See Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992) (applying deferral rule when allegations were that the tribal court has no jurisdiction because the relevant activities took place outside the reservation); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987) (applying comity rule to diversity cases). The same comity principles require deferral to a tribal court's determination of the meaning of its own jurisdictional statutes. *See Twin City Const. Co. v. Turtle Mountain Band*, 911 F.2d 137 (8th Cir. 1990). [HN14] If the tribal court decides it has jurisdiction, the same deference policy precludes relitigation of issues resolved in tribal courts. Iowa Mutual, 480 U.S. at 19. However, the deferral rule is not mandatory, particularly if there is no pending tribal court action and/or federal or state law controls

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forceable contracts existed between the Tribe and plaintiffs, and whether Park Place interfered with the contracts and the project. Defendant argued that the Tribal Court decision had no effect because (1) the Tribal Court is not a recognized, legitimate governmental entity of the Tribe, (2) the decision was a default judgment and is thus not entitled to collateral estoppel effect, and (3) the Tribal Court decision purports to decide issues based upon Mohawk tribal law and does not purport to decide any of the legal issues raised in the motion to dismiss.

resolution of the issues in the case. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 780 F. Supp. 504, 1991 WL 961232 at *4 (N.D. Ill. 1991), rev'd on other grounds, 983 F.2d 803 (7th Cir. 1992) (contract stipulated that disputes would be resolved under Illinois law in Illinois state and federal courts), *cert. denied*, 510 U.S. 1019, 114 S. Ct. 621, 126 L. Ed. 2d 585 (1993).

Plaintiffs' claims for inducing breach of contract and interference are governed by New York's common law, and their other claims arise under New York statutes. The issue of the validity of the contracts requires application of Federal law, as does Defendant's Noerr-Pennington defense. The case involves no questions of tribal law, and no parties to the case are members of the Tribe. Moreover, only defendant Park Place is before both the Tribal Court and this Court. Plaintiffs in the Tribal Court action were not parties to the contracts—they are tribal members who disagree with the Tribal Council's decision to sever the Tribe's ties with Catskill. Comity does not compel me to abstain from deciding this case.

2. The Tribal Court Ruling Does Not Bar Resolution of Plaintiffs' Claims

The parties do not contend that the Tribal Court's judgment is *res judicata* as to any of plaintiffs' claims. Plaintiffs do argue, however, that collateral estoppel, or issue preclusion, bars litigation of issues also raised in the Tribal Court action, namely: whether the contracts between Catskill and the Tribe are void, and whether Park Place is liable for inducing breach of contract or interference. Plaintiffs are incorrect.

A party is collaterally estopped from raising an issue in a proceeding if: (1) the identical issue was raised in a previous proceeding; (2) the issue was "actually litigated and decided" in the previous proceeding; (3) the party had a "full and fair opportunity" to litigate the issue; and (4) the resolution of the issue was necessary to support a valid judgment on the merits." *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 91 (2d Cir. 1997).

The Tribal Court decision was a default judgment. While the Tribal Court made findings of fact, these were not necessary to entry of the default judgment. Furthermore, because the decision was a default judgment, these findings were not "actually litigated." According to the Restatement of the Law of Judgments, "In the case of a judgment entered by confession, consent or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action." Restatement of the Law of Judgments (2d) § 27 & comment e (1982). *See also Kelleran v. Andrijevic*, 825 F.2d 692, 700 (2d Cir. 1987); *Abrams v. Interco Inc.*, 719 F.2d 23, 33 n.9 (2d Cir. 1983) (citing Restatement). Thus, collateral estoppel does not bar resolution of plaintiffs' claims.

I turn now to the merits of defendant's motion.

B. Standard for Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. The standard of review on a motion to dismiss is heavily weighted in favor of the plaintiff. The Court is required to read a complaint generously, drawing all reasonable inferences from the complaint's allega-

tions. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." *Frasier v. General Electric Co.*, 930 F.2d 1004, 1007 (2d Cir.1991). The Court must deny the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Stewart v. Jackson & Nash*, 976 F.2d 86, 87 (2d Cir. 1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

Defendant moves to dismiss Count 1, intentional tortious interference with contractual relations, on the ground that there was no enforceable contract in place at the time defendant is alleged to have induced the Mohawks' breach. Defendant also moves to dismiss Count 2, interference with prospective business relationship, on the grounds that plaintiffs have failed to allege (1) "wrongful conduct," and (2) that but for Park Place's conduct, plaintiffs would have succeeded in building their casino. Park Place moves to dismiss Count 3 for unfair competition on the same grounds as Count 1, and also on the grounds that plaintiffs have failed to allege any misappropriation of property. Defendant argues for dismissal of Count 4 on the grounds that plaintiffs have not alleged any of the elements of a Donnelly Act claim. Finally, defendant argues that the entire complaint should be dismissed because Park Place's alleged actions in lobbying the Mohawks are fully protected by the Noerr-Pennington doctrine and therefore cannot form the basis for either a tort or antitrust claim.

C. Plaintiffs Fail To State A Claim For Tortious Interference Of Contract

The elements of tortious interference with contract are well-settled under New York law. The elements include: the existence of a valid contract between the plaintiff and some third party; knowledge of that contract by the defendant; defendant's intentional inducement of a breach by the third party to the contract; and damages to the plaintiff as a result of the third party's breach. *See Int'l Minerals and Resources, SA v. Pappas*, 96 F.3d 586, 595 (2d Cir. 1996) (citing *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289 (1993)). The third's party's breach must have been caused by the defendant, and the plaintiff must prove that the third party would not have breached except for the wrongful activities of the defendant. *See Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 828 (2d Cir. 1990).

That plaintiffs and the Mohawks had entered into agreements is beyond dispute. So is defendant's knowledge of the agreements. *See supra*, section I.E. Plaintiffs' allegations of interference are more than sufficient. And the existence of an indemnity agreement in favor of the Mohawks by Park Place supports a finding of knowing and wrongful interference. *See, e.g., Texaco v. Pennzoil*, 729 S.W.2d 768, 802-03 (Tex. App. 1987), *cert. dismissed* 485 U.S. 994, 108 S. Ct. 1305, 99 L. Ed. 2d 686 (1988).

However, the New York Court of Appeals has made clear than an essential element of a claim for tortious interference of contract is the existence of an enforceable contract, as well as its breach as a result of the defendant's tortious conduct. *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d

614, 621-22, 641 N.Y.S.2d 581, 584-86, 664 N.E.2d 492 (1996). Defendant claims that the agreements between Catskill and the Tribe are not enforceable contracts because they had not been approved as required under the IGRA or Section 81.[58] Defendant is correct.

1. The gaming management agreement is void under 25 U.S.C. 2711(b)

The Gaming Management Agreement contemplates a relationship between Catskill and the Tribe under which Catskill would be primarily responsible for the organization and operation of the casino, and would give the Tribe a portion of the profits. The management agreement required NIGC approval. 25 U.S.C. § 2711(a)(1). Management agreements that do not have NIGC approval are void and unenforceable. 25 C.F.R § 533.7. The Management Agreement, under which Catskill would earn its gaming profits, was not approved at the time defendant allegedly interfered with the agreement. Thus, there was no valid and enforceable contract with which defendant could interfere.

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[58] Specifically, defendant contends that: (1) the Land Purchase Agreement required Governor Pataki's concurrence in the BIA approval under 25 U.S.C. § 2719; (2) the Management Agreement required NIGC approval under § 2710 and § 2711; (3) the Mortgage Agreement (in addition to not being executed) required approval under Section 81; (4) the Shared Facilities Agreement required approval under Section 81, and was contingent on § 2719 approval; (5) the Development and Construction Agreement required approval under Section 81, and was contingent on approval under § 2719. Furthermore, because the Tribe had no compact in place with the State that allowed for electronic games, defendant argues that the project is economically untenable, and that damages, should be limited to lost revenue from the "table games" allowed by the current compact.

Catskill argues that this and the other agreements were fully enforceable because the parties agreed to cooperate and to use commercially reasonable best efforts to obtain government approval, so that, even though no government approval was obtained, the contracts are nonetheless enforceable to the extent they require the Mohawks to use good faith efforts to bring about government approval. This contention was expressly rejected in *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986), in which the Ninth Circuit explained that the failure to obtain government approval renders the entire agreement invalid, including any "best efforts" clause. The validity of the management agreement (and all agreements collateral to it) is a matter of statutory application—it is not dependent on language used by the parties in the contract.[59]

2. Plaintiffs' Other Agreements Are Void Under 25 U.S.C. § 2711(a)(3)

Collateral agreements executed in conjunction with gaming management contracts are included in the definition of management contracts, and thus are also void absent NIGC approval. 25 U.S.C. § 2711(a)(3); 25 C.F.R § 533.7. A collateral agreement is defined as

> any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a man-

[59] However, as discussed below, a "best efforts" provision will come into play where a contract is valid; *i.e.*, it does not fall within Section 2711 or any other "automatic invalidation" statutory provision, and there are no express conditions precedent to the contract's validity. *See supra*, section II.C.3.

> agement contractor or subcontractor (or any person or entity related to a management contractor or subcontractor).

25 C.F.R. § 502.5.

Each of the agreements executed by the parties relates either directly or indirectly to rights or obligations created between the Tribe and Catskill or one of its affiliates under the Management Agreement:

> The Land Purchase and Mortgage Agreements effect the transfer and lease of the Raceway property for the purpose of building and operating the casino. Catskill will be paid for this transfer by profits from the casino, which, under the Management Agreement, Catskill will operate.
>
> Under the Development and Construction Agreement, Catskill agreed to design, construct and furnish the casino, as well as assist the Tribe in obtaining a loan to pay for the costs of construction of the facility. While this agreement provides no additional compensation to Catskill, the Management Agreement refers to need for Catskill's "expertise, experience and ability to assist the [Tribe] in obtaining financing to construct and develop" the casino and "to manage, operate and maintain" the casino, as well as "to instruct the [Tribe] and others in the operation of a first-class gaming facility." (Carpinello Decl. at Ex. C at 1-2.) The Construction Agreement thus relates directly to Catskill's right and obligations under the Management Agreement.
>
> Finally, the Shared Facilities Agreement describes the operation of the adjacent racetrack as it relates to the casino, and grants Catskill the right to operate the track facility. It refers ex-

plicitly to the Management Agreement and the Development and Construction Agreement, and is drafted to work in conjunction with those agreements.

I thus find that the Land Purchase Agreement, the Mortgage Agreement, the Shared Facilities Agreement, and the Development and Construction Agreement, are void under Section 2711(a)(3).

3. Even If Plaintiffs' Other Agreements Are not Void Under § 2711(a)(3), All Except the Land Purchase Agreement Are Not Valid and Enforceable For Other Reasons

Under the facts of this case, each of the other agreements executed by the parties is a collateral agreement within Section 2711. Assuming, however, these agreements do not fall within the Act's definition of "collateral agreements," all but the Land Purchase Agreement are invalid on other grounds.

a. Mortgage Agreement

Defendant claims that the mortgage agreement was not executed, and plaintiffs do not dispute this contention. The mortgage agreement would have been executed upon the placing of land into trust, an event which had not yet occurred. Thus, as an alternative grounds for invalidity, there is no basis on which I can find that a signed, executed mortgage agreement existed between the parties. Furthermore, as an agreement that encumbers Indian lands for a period of more than seven years, the agreement is invalid without BIA approval under the amended Section 81.

b. Shared Facilities Agreement

The shared facilities agreement, which sets out the terms by which the plaintiffs and the Mohawks were to coordinate operation of the casino facilities, expressly states that it is contingent upon the conveyance of the subject property to the U.S. in trust as provided for in the Land Purchase Agreement. The conveyance of the land into trust is a condition precedent to the validity of the contract, and it did not occur, thus creating an alternative grounds for its invalidity. *Cauff, Lippman & Co. v. Apogee Finance Group, Inc.*, 807 F. Supp. 1007, 1022 (S.D.N.Y. 1992); *Office of the Comptroller General of the Republic of Bolivia on behalf of Bolivian Airforce v. Int'l Promotions & Ventures*, Ltd., 618 F. Supp. 202, 207 (S.D.N.Y.1985).

c. Development and Construction Agreement

Even if the IGRA does not apply to the Development and Construction Agreement, that agreement must be approved under Section 81. *See* United States v. D & J Enterprises, 1993 U.S. Dist. LEXIS 19843, No. 93- C-233-C, 1993 WL 767689 (W.D. Wis. Dec. 23, 1993) (applying analysis used to evaluate whether management contracts are "relative to Indian lands" to non-management, development and construction agreements).

d. Land Purchase Agreement

Defendant argues that the Land Purchase Agreement is also void because the trust transfer had not yet been approved under Section 2719 and Section 81. This is not the case.

Under 25 U.S.C. § 2719, the Secretary of the Interior, with the Governor's concurrence, must approve

the application to transfer the land into trust. Without the Governor's concurrence, the approval was not complete. However, nothing in Section 2719 explicitly invalidates contracts to purchase land held in trust where the underlying land-into-trust application has not been approved. Therefore, the Land Purchase Agreement is not invalid under Section 2719.

Section 81 does not apply to the land-into-trust application or the Land Purchase Agreement. Section 81 applies to contracts that are for services relating to Indian lands (pre amendment), or that encumber Indian lands for a period of seven or more years. Plaintiffs are correct that the act of placing land into trust does not fall within either of these definitions. [HN23] A land-into-trust transaction generally falls under 25 U.S.C. § 465,[60] or, if it relates to gaming, under Section 2719.

Thus, no statutory provision other than Section 2711 acts to invalidate the Land Purchase Agreement.[61] Nonetheless, I have already concluded that the Land Purchase Agreement is void as collateral to the Management Agreement.

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[60] Section 465 authorizes the Secretary of the Interior, in his discretion, to acquire "lands, water rights or surface rights" through "purchase, relinquishment, gift, exchange, or assignment. . . within or without existing reservations, including trust or otherwise restricted allotments." Under regulations passed pursuant to this section, the land attains trust status only after the Secretary has published a notice of intent to take the land into trust pursuant to § 151.6(c)(2), the time period for appeal has run, and all title objections have been cleared, and the BIA approves or issues the appropriate instrument of conveyance.

[61] The parties did not address whether the trust transfer was an express condition precedent to liability under the contract, or whether the contract is void under its terms for any other reason.

If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed were wrongful. Defendant argues for the application of the wrongful means standard enunciated in *PPX Enterprises, Inc., v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 269 (2d Cir. 1987), where the Second Circuit in dicta limited those means to criminal or fraudulent conduct. However, another panel of the Second Circuit has stated that "this interpretation since has been recognized as unduly narrow and not in accordance with New York law." *Hannex Corp. v. GMI*, Inc., 140 F.3d 194, 206 n.9 (2d Cir. 1998) (noting that the PPX Enterprises limitation is no longer binding on the court, inasmuch as the New York Court of Appeals more recently reiterated a broader standard in NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc., 87 N.Y.2d 614, 621, 664 N.E.2d 492, 496, 641 N.Y.S.2d 581, 585 (1996), which reiterated a definition of wrongful means under New York law to include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure."); *See also Ivy Mar Co., Inc. v. C.R. Seasons Ltd.*, 1998 U.S. Dist. LEXIS 15902, No. 95- CV-0508, 1998 WL 704112, at *16 (E.D.N.Y. Oct. 7, 1998) (recognizing abrogation and holding that dishonesty and unfair means are also sufficient); but *See Gottlieb v. Simon*, 1998 U.S. Dist. LEXIS 15226, 1998 WL 684839, at *3 (S.D.N.Y. 1998) (granting defendant summary judgment after *Hannex* on grounds that plaintiff could not show that defendant's alleged tortious interference was "criminal or fraudulent"); *aff'd sub nom. RKG Holdings, Inc. v. Simon*, 182 F.3d 901 (2d Cir. 1999).

Even under the more stringent standard, plaintiffs can survive the motion to dismiss. Under New York

law, fraud is generally defined as the gain of an advantage to another's detriment by deceitful or unfair means. *See* 60 N.Y. Jur.2d Fraud § 1 (1987 & Supp.1999). Plaintiffs have alleged facts from which a juror could conclude that Park Place principals lied about Catskill and the status of the pending regulatory approval to induce the Mohawks to break their agreement with Catskill.

Defendant's argument that plaintiffs have not shown "but for" causation—that is, but for their wrongful conduct the prospective business venture would have come to fruition—is not properly considered on a motion to dismiss, as it involves issues of fact. Plaintiffs clearly state in their complaint that they view Park Place's efforts to become the exclusive operator of any future Mohawk casinos as the reason the Monticello casino was not built.

2. Plaintiffs' Have Adequately Pled Injury To The Business Relationship

The Court has also considered whether Justice Teresi's ruling compels dismissal of this claim on the grounds that Park Place did not directly cause Catskill's losses, such as gambling revenues and development fees, on the casino project.[62]

Recovery in tort extends to any loss that naturally follows the wrongful act. *Delehanty v. Walzer*, 59 N.Y.S.2d 777 (1945 Sup), *rev'd on other grounds*, 271 A.D. 886, 67 N.Y.S.2d 25, *aff'd* 298 N.Y. 820, 83

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[62] The Court first raised the issue of the availability of lost profits or damages with the parties at a pre-trial conference on March 9, 2001. After Judge Teresi issued his opinion, the Court, in an April 25, 2001 letter, invited both parties to comment on the ruling's impact on this lawsuit. Both parties responded by letter on May 2, 2001.

N.E.2d 863. Under New York law, lost profits are recoverable as an element of damages where they result as the natural and probable consequence of a tortious act. 342 *Holding Corp. v. Carlyle Construction Corp.*, 31 A.D.2d 605, 295 N.Y.S.2d 248, 249. *Hughes v. Nationwide Mut. Ins. Co.*, 98 Misc. 2d 667, 414 N.Y.S.2d 493 (1979). Lost profits may be recovered if plaintiffs prove them with reasonable certainty and without speculation. *See Steitz v. Gifford*, 280 N.Y. 15, 20, 19 N.E.2d 661; *Dunlop Tire & Rubber Corp. v. FMC Corp.*, 53 A.D.2d 150, 154-155, 385 N.Y.S.2d 971; *Paduano v. State of New York*, 203 A.D. 503, 505, 196 N.Y.S. 804; *Veverka v. Spinella*, 60 Misc. 2d 529, 303 N.Y.S.2d 305 (1969).

Defendant argues that, because approval of the casino project was by no means an inevitability, Park Place's interference could not be the direct cause of plaintiffs' injuries. Specifically, they argue that any claim for lost profits is too uncertain. They point to Judge Teresi's decision as proof that the project was dependent on a number of remaining contingencies, not the least of which was renegotiation and approval of a valid compact between the Tribe and the State.

Plaintiffs for their part claim that, at the time Park Place allegedly induced the Mohawks to drop Catskill, "all the planets were aligned in Catskill's favor" and "there were no obvious impediments to the successful completion of the Project." (Pl. May 2, 2001 letter at 3, 4).[63] In addition, they argue that Judge

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[63] In support of this contention, they point to the following (among other items): (1) all necessary contracts between the parties had been executed (2) the SEQRA process (undefined by the plaintiffs) was fully completed, including all environmental approvals; (3) the BIA had approved the Land to Trust transfer, "subject to the concurrence of the Governor and NIGC approval

Teresi's decision does not make their claims more speculative, because the Tribe was entitled, as a matter of federal law, to conduct Class III gaming on its lands, with or without a compact.

Plaintiffs are correct that, with proper approvals, they would have eventually been allowed to operate video gaming terminals and other Class III gambling activities at the casino, despite the lack of a valid compact with the State. Under the IGRA, a tribe may engage in Class III gaming on tribal lands (including trust lands) in any of three different ways, only one of which appears to have been foreclosed by the Saratoga decision. First, they may do so voluntarily, by a compact executed and properly authorized under its respective laws by the tribe and the state (including the state legislature, where required under state law). 25 U.S.C. § 2710(d)(3). Failing this—and it appears here that because of opposition to gambling in the New York State Assembly such efforts likely will fail—the Tribe may bring an action against the state under the statutory compact mediation procedures in the IGRA. 25 U.S.C. § 2710(d)(7). If a Tribe sues, a State asserts an Eleventh Amend-

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of the management agreement." the latter of which was "progressing favorably;" (4) the parties had received the NIGC's final comments and NIGC approval "at this stage was a mere formality for documentation compliance;" (5) "the Governor was ready to concur;" (6) the local community was behind the project; and (7) the construction contract was awarded and construction was set to begin immediately subsequent to the expected approvals. (*Id.*) They also claim that "the evidence will show that the BIA would not have approved the land to Trust transfer had the Governor not indicated his support and willingness to amend the existing compact to add VLTs" (a term which plaintiffs do not define, but which the court believes is a reference to video gaming terminals of some kind). (*Id.* at 3.)

ment sovereign immunity defense, and the action is dismissed on that basis, a Tribe can still conduct Class III gaming pursuant to regulations promulgated by the Department of the Interior in 1999. These regulations mandate that the Secretary shall issue "gaming procedures" which are the legal equivalent of a compact properly authorized by a state or in a court action under IGRA. 25 C.F.R. 291. The goal of these procedures is to provide for Class III gaming operations on tribal lands despite opposition or lack of cooperation from the state. For instance, the Mashantuckett Pequot Foxwoods casino in Connecticut has operated under such procedures prescribed by the Secretary since its inception. *Mashantucket Pequot Tribe v. State of Connecticut*, 737 F. Supp. 169, *aff'd* 913 F.2d 1024 (2d Cir. 1990). Thus, defendants incorrectly characterize Catskill's claim that it would have obtained government approval of the casino as "purely speculative."

Nevertheless, the above-described processes do take time. Regardless of whether the Tribe had to renegotiate the compact, bring suit to force those negotiations, or bypass the State in the form of DO authorization, much work remained, and there would appear to be no way to estimate the timetable for completion. I thus find it hard to see how plaintiffs will be able to prove that Park Place's actions were the proximate cause of future lost profits.

However, whether or plaintiffs can show that their losses on this venture stemmed directly (and not as the result of any intervening causes) from Park Place's actions is a question of fact, which is not properly decided on a motion to dismiss. Plaintiffs should be allowed to submit evidence on any damages that they are claiming flowed naturally and

probably from defendant's alleged interference, and the subsequent termination of the Mohawk's relationship with Catskill. In addition, some of plaintiffs' potential profits from the project (*e.g.*, any profits derived from Class II gaming operations) were not necessarily dependent on successful negotiation of a compact with the state. While those profits may be unduly speculative for other reasons, I leave this and any other analysis of damages for the parties' post-discovery motions.

3. The Noerr-Pennington Doctrine Does Not Apply To Defendant's Actions

Park Place also argues that it is immune from liability under the Noerr-Pennington doctrine. Defendant is incorrect.

The Noerr-Pennington doctrine provides immunity from liability under the antitrust laws and other tort laws for conduct seeking to influence government action. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). Under this doctrine, the Supreme Court has stated that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136, 81 S. Ct. at 529. This immunity applies to lobbying or petitioning in an effort to obtain an exclusive arrangement with a governing body, such as a franchise or license. *See, e.g., Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) (applying doctrine to petitioning of municipal government for cable franchise);

Video International Production, Inc., v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988) (applying doctrine to petitioning for favorable interpretation of zoning codes so as to preclude competition).

Defendant argues that Noerr-Pennington applies to it because plaintiffs' action is based on Park Place's alleged attempt to obtain a contractual relationship with the Tribe, which is recognized under federal law as a sovereign governmental entity. Even assuming that the April 14, 2000 agreement was made with a governmental entity (which is by no means clear, *see supra section* I.F.), defendant's invocation of the doctrine can not stand.

As plaintiffs correctly argue, the Noerr-Pennington doctrine is inapplicable when parties are "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." *Con't Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962). This is because the doctrine "is founded upon the individual's constitutional right of petition under the First Amendment and upon the corresponding concern that the representatives in the legislatures retain access to the opinions of their constituents, unhampered by collateral regulation." *Hunt v. Mobil Corp.*, 410 F. Supp. 10, 20 (S.D.N.Y. 1975) (recognizing the Supreme Court's exclusion of commercial activity from the doctrine). Park Place was not "lobbying"—it did not seek to influence the Mohawks to pass new laws or to enforce laws in a particular way. Rather, it entered into a purely commercial relationship with the Mohawks.

Defendant's motion to dismiss plaintiffs' Second Cause of Action is denied.

E. Unfair Competition

An unfair competition claim under New York law is very similar to a claim of unfair competition under Section 43(a) of the *Lanham Act. Kregos v. Associated Press*, 795 F. Supp. 1325, 1336 (S.D.N.Y. 1992), *aff'd*, 3 F.3d 656 (2d Cir. 1993), *cert. denied*, 510 U.S. 1112, 114 S. Ct. 1056, 127 L. Ed. 2d 376 (1994). "The essence of unfair competition under New York common law is 'the bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the origin of the goods." *Rosenfeld v. W.B. Saunders*, 728 F. Supp. 236, 249-50 (S.D.N.Y.) (quoting *Computer Assocs. Int'l, Inc. v. Computer Automation, Inc.*, 678 F. Supp. 424, 429 (S.D.N.Y. 1987), aff'd, 923 F.2d 845 (2d Cir. 1990)). The plaintiff must show either actual confusion in an action for damages or a likelihood of confusion for equitable relief. *See W.W.W. Pharmaceutical Co. v. Gillette Co.*, 984 F.2d 567, 576 (2d Cir. 1993) (citation omitted). Additionally, there must be some showing of bad faith. *See Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir. 1980).

The facts of this case do not sound in a claim for unfair competition. Plaintiffs have not alleged that defendant, in attempting to obtain the Mohawk's business, tried to pass itself off as the plaintiffs, or to misappropriate any of the plaintiffs' property. *See Randa Corp. v. Mulberry Thai Silk, Inc.*, 2000 U.S. Dist. LEXIS 17014, 2000 WL 1741680 at *3 (S.D.N.Y. Nov. 27, 2000). Quite the opposite, in fact—the ostensible reason for the Mohawk's decision to switch to Park Place was because defendant was not Catskill.

Plaintiffs' Third Cause of Action is dismissed.

F. Donnelly Act Claims

The Donnelly Act provides, in pertinent part:

> Every contract, agreement, arrangement or combination whereby[:]
>
> A monopoly in the conduct of any business, trade, or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in [New York] state is or may be restrained or whereby
>
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade, or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy; illegal and void.

19 Consol. N.Y. Gen. Bus. Law § 340 (McKinney's 2001).

The Donnelly Act is patterned after the Sherman Antitrust Act, and is generally interpreted consistently with federal antitrust law under the *Sherman Act*. *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 98 n. 4 (2d Cir. 1987); *See also Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 254 (S.D.N.Y. 1995) (the Donnelly Act is modeled on the Sherman Act and is construed in light of federal precedent); *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335, 525 N.Y.S.2d 816, 820, 520 N.E.2d 535 (1988).

To assert a claim under the Donnelly Act, a plaintiff must: (1) identify the relevant market; (2) describe the nature and effects of the purported conspiracy; (3) describe how the economic impact of the conspiracy restrains trade in the market in question; and (4) identify a conspiracy or reciprocal relationship between two or more parties. *Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc.*, 136 A.D.2d 461, 462, 523 N.Y.S.2d 102, 103 (1st Dept. 1988). *See also Newsday, Inc. v. Fantastic Mind, Inc.*, 237 A.D.2d 497, 497, 655 N.Y.S.2d 583, 584 (2d Dep't 1997); *Shepard Indus., Inc. v. 135 East 57th St. LLC*, 1999 U.S. Dist. LEXIS 14431, 1999 WL 728641, at *3 (S.D.N.Y. 1999).

Dismissals at the pleading stage of an antitrust claim prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976). Nevertheless, conclusory allegations which merely recite the litany of antitrust will not suffice. *John's Insulation, Inc. v. Siska Constr. Co.*, 774 F. Supp. 156, 163 (S.D.N.Y. 1991) "This court retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* (citing *Assoc. General Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 528 n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)). At a minimum, plaintiffs' allegations must cover all the elements that comprise the theory for relief. *Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*, 31 F.3d 89, 95 (2d Cir. 1994) (citations omitted).

Defendant argues first that plaintiffs have failed to identify a relevant market. For antitrust purposes, a

relevant market consists of both a product market—those commodities or services that are reasonably interchangeable, and a geographic market—the area in which such reasonable interchangeability occurs. *Pyramid Co. of Rockland v. Mautner*, 153 Misc. 2d 458, 463, 581 N.Y.S.2d 562 (N.Y. Sup. 1992)(citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)). The plaintiff must explain "why the market it alleges is in fact the relevant, economically significant product market." *Re-Alco Industries, Inc. v. National Center for Health Educ. Inc.*, 812 F. Supp. 387, 391 (S.D.N.Y. 1993).

The complaint alleges that defendant restrained competition "in the furnishing of gaming services in New York." Plaintiffs have thus clearly identified the geographical market as the state of New York. However, the allegation potentially describes two product markets to which the plaintiff may be referring: (1) providing casino gaming to gaming customers who currently travel outside New York for the same services, and (2) providing casino gaming development, management and related services to Indian tribes seeking to establish casinos on their lands. It is not clear from the complaint from which market plaintiffs claim they have been excluded.

Plaintiffs have also failed to allege with specificity how Park Place's arrangement with the Mohawks acts to restrain competition within either market. [HN38] A complaint for a violation under the Donnelly Act must allege anticompetitive effects. *Hsing Chow v. Union Cent. Life Ins. Co.*, 457 F. Supp. 1303, 1306-7 (E.D.N.Y. 1978) (finding that plaintiff's allegation that she had been put out of business did not suffice to show anti-competitive effects in the industry flowing from her termination). The market for

Indian gaming is already competitively limited by its nature—only Indian tribes may legally conduct gaming operations, and any gaming activities are heavily regulated under both Federal law and the terms of Tribal-State compact. Plaintiffs have alleged no facts which support why plaintiffs should be allowed to build a casino while Park Place should not. And at present, under Judge Teresi's ruling, no gaming project (including, quite possibly, the ones already up and running[64]) is legal, because the IGRA requires formation of a compact and the existing compacts have been invalidated.

Plaintiffs' Fourth Cause of Action is dismissed.

CONCLUSION

Plaintiffs' First, Third and Fourth Causes of Action are dismissed.

This constitutes the order and decision of the Court.

May 14, 2001

Colleen McMahon

U.S.D.J.

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[64] The Court is aware that the Attorney General of the State of New York has stated publicly that existing facilities, including Akwesasne, are not affected by Judge Teresi's ruling. *See* Michael Gormley, "*State Says Existing Casinos not Threatened in Indian Gambling Decision*," Associated Press, April 20, 2001.

APPENDIX B

[Logo]

January 9, 2004

Loretta M. Gastwirth, Esq.
Meltzer, Lippe & Goldstein, L.L.P.
190 Willis Avenue
Mineola, NY 11501

Re: NIGC Management Contract Review
President R.C.- St Regis Management Company and the St. Regis Mohawk Tribe

Dear Ms. Gastwirth:

The purpose of this letter is to explain briefly the National Indian Gaming Commission's (NIGC) review of management contracts and collateral agreements to those contracts and to respond to questions you pose about the review of the management contract between President R.C.—St Regis Management Company and the St. Regis Mohawk Tribe.

The NIGC Chairman reviews and approves management agreements for operation of tribal gaming facilities under provisions of the Indian Gaming Regulatory Act (IGRA), specifically 25 U.S.C. § 2711. The NIGC has issued regulations to assist and guide the Chairman's review of such contracts. The NIGC has defined the term "management contract" to mean "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. The NIGC has defined "collateral agreement" to mean "any contract, whether or not in writing, that is

related either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5.

In reviewing a management contract, the NIGC Chairman requires as a matter of practice that the tribe and manager submit all other agreements between the parties (the tribe and manager, or any entity related to the manager) for review in an effort to determine the full extent of the relationship between the parties and/or whether the management agreement itself defines the full relationship. The reason for this document review is to determine if there are other gaming management duties, responsibilities, and obligations in the other agreements that are placed on the tribe and/or the manager, or entities related to the manager, or third parties, which might affect the contractual relationship, or compliance with IGRA, that is otherwise defined in the basic management contract. As an example, in a situation where a pre-opening development agreement establishes a gaming management role of some kind for the manager-developer, that development agreement will also be subject to review and approval or disapproval along with the basic management contract.

Another purpose for reviewing the other agreements is to determine if there is additional compensation for the manager, as a consequence of the intended gaming management activity, that may have been placed in some other agreement. IGRA establishes ceilings on the level of compensation that

can be paid for management of a gaming operation and on the length of time for an agreement to operate. Terms of a collateral agreement may indicate that compensation is being paid in addition to that specified in the basic management contract.

Normally, a collateral agreement is an additional agreement between the two parties to the management contract. There may be unique circumstances, however, where an agreement defines a relationship between a subcontractor and a manager that is related to the management of the gaming facility. In this instance, such an agreement would also be collateral to the management contract.

While review of a collateral agreement may affect the approval or disapproval of a management contract, the Chairman does not approve the collateral agreement itself. The scope of the NIGC Chairman's review is for approval of a management contract. The Chairman's approval does not necessarily extend to the entire contractual relationship that may exist between the parties but to the document or documents that establish the terms and conditions of the management activity—the management agreement and, possibly, collateral agreements that have gaming management provisions. In most cases the parties do attempt to put the management provisions into only the management agreement.

You asked whether the construction agreement between President R.C. – St. Regis Management Company and Anderson Blake Construction Corporation for construction of the Akwesasne Mohawk Casino required approval of the NIGC Chairman. The management contract approved on December 26, 1997, required the subsequent execution of a construction contract based on construction provisions

set forth in the management contract. Had the construction agreement existed at the time the management contract was approved, the review process for the management contract could have, but not necessarily would have, included review of the construction agreement. If the construction agreement existed at the time of the approval of the management contract, and if it was reviewed, it would have been subject to approval or disapproval as a management contract if it (the construction agreement) provided for management of the gaming operation in some manner. The construction agreement, as presented on February 9, 1999, at our request, after approval of the management contract between President R.C. – St. Regis Management Company and the St. Regis Mohawk Tribe, did not require approval by the NIGC Chairman because it does not contain gaming management duties, responsibilities, and obligations, nor does it affect the gaming management duties, responsibilities, and obligations that are placed on the Tribe and/or the manager, or entities related to the manager, or third parties, by the basic management agreement. The compensation provisions in the construction agreement relate only to construction of the facility and not to management of the operation.

Finally, you ask for assessment of two letters, copies of which were provided as enclosures to your letter of November 18, 2003 to Assistant United States Attorney Ala Burch. The first letter, dated September 19, 1996, is signed by then-NIGC Chairman Monteau. The second, dated June 26, 2001, is signed by then-NIGC Chairman Deer. The suitability requirements in a management contract review referred to in the above letters apply only to individuals and entities with a financial interest in, or manage-

ment responsibility for, a management contract and not other agreements, such as the Anders, Blake construction contract.

Sincerely yours,

/s/ William F. Grant
WILLIAM F. GRANT
Acting General Counsel

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-17066
D.C. No. CV-05-01605-SC

GUIDIVILLE BAND OF POMO INDIANS,
Plaintiff-Appellee,

v.

NGV GAMING, LTD, a Florida partnership,
Defendant-Appellant.

No. 05-17067
D.C. No. CV-04-03955-SC

NGV GAMING, LTD, a Florida partnership,
Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.,
a Delaware corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted
October 16, 2007—San Francisco, California

Filed June 26, 2008

OPINION

Before: Stephen S. Trott and N. Randy Smith, *Circuit Judges*, and Milton I. Shadur, *Senior District Judge*.

Opinion by Judge Shadur;

Dissent by Judge N.R. Smith

OPINION

SHADUR, *Senior District Judge*:

This appeal presents the single, seemingly straightforward question whether the word "is" really means "is," at least as that word is employed in 25 U.S.C. § 81.[1] At the core of the present dispute, that statute requires the Secretary of the Department of the Interior ("Secretary") to approve any "contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years" before such a contract can be considered valid. Section 81(a) defines the term "Indian lands" in part as "lands the title to which is held by the United States in trust for an Indian tribe" (emphasis added).

Appellant NGV Gaming Ltd. ("NGV") asks us to read Section 81 literally—as pertaining solely to contracts that implicate lands already held in trust by the federal government. Appellees Harrah's Operating Company ("Harrah's") and Guidiville Band of Pomo Indians ("the Tribe"[2]), on the other hand, urge

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The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

[1] That and all other provisions of Title 25 will hereafter be cited simply "Section —," omitting the prefatory "25 U.S.C."

[2] Because that Appellee has consistently referred to itself as "the Tribe" in its briefs, we too adopt the same shorthand reference.

a nonliteral reading of the statute—one that would treat Section 81 as also covering contracts in which the parties reach agreement, not with respect to already-held lands, but to acquire lands in the future that might eventually be held in trust. Under the latter interpretation the contract at issue in this appeal would be invalid, lacking as it does the Secretary's approval, and the district court's decision to dismiss NGV's suit against Harrah's for tortious interference with that contract would have to be affirmed. But under the first—and literal—reading, the district court's decision would be in error, and the state law action could proceed.

Motivated largely by the plain meaning of Section 81—but after also taking into account related statutes, relevant legislative history and the language of the contract itself—we conclude that the word "is" means just that (in the most basic, present-tense sense of the word) and that Section 81 therefore applies only to contracts that affect lands already held in trust by the United States. We therefore reverse the district court and remand for further proceedings.

I. Factual Background

A. Terms of the Contract

On July 3, 2002 the Tribe contracted with FEGV Corporation ("FEGV") for the latter to develop and construct a gaming facility on a to-be-acquired parcel of land in Northern California. In December 2003 FEGV assigned to NGV its rights and duties under that contract, which comprised two separate documents: (1) a Development Agreement and Personal

Property Lease ("the Lease"), and (2) a Cash Manage

ment Agreement. Here is the purpose of the transaction as described at the outset of the Lease:

> The Tribe requires assistance with (i) financing the day-to-day operations of the Tribal government, (ii) acquiring real property and petitioning the United States to accept title to such property in trust for the benefit of the Tribe . . . , and (iii) the development, design, financing, construction and initial equipping of the Facility.

"Facility," the Lease explains, includes "buildings and improvements" that would be constructed on to-be-acquired real property and that would then be used to conduct Class II or Class III gaming[3] for the public. Both parties intended to transfer the to-be-acquired real property into trust, a process set forth under Section 465 that allows the United States to accept and hold property for the benefit of an Indian tribe.[4] But to be clear: No such land existed at the

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[3] Class II gaming includes bingo and certain card games, but excludes any "banked card games, electronic games of chance, and slot machines" (Sections 2703(7)(A) and (B)). Class III gaming involves all other forms of high-stakes games (Section 2703(8)).

[4] Section 465 authorizes the Secretary "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." In addition the statute specifies (emphasis added):

> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States *in trust for the Indian tribe* or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

time the contract was entered into—nothing had been identified or acquired or, least of all, had been placed in trust.

NGV's role in that forward-looking endeavor was to use its "experience, expertise and resources . . . to assist the Tribe" in accomplishing its objectives. In exchange NGV would be compensated through a combination of fixed payments and a percentage of gross and net revenues earned by the newly constructed gaming facility. In addition NGV would enjoy other rights related to the land. Most notably, under the Lease the Tribe could not without NGV's consent:

> Sell, dispose of, lease, assign, sublet, transfer, mortgage or encumber (whether voluntarily or by operation of law) all or any part of its right, title, or interest in or to the Trust Lands, the Facility, or the Equipment.

Finally the Lease set forth several commitments, one of which is critically important to this appeal. It specified that the Tribe would "[o]btain all necessary and appropriate federal and tribal permits and approvals necessary with respect to the enforceability of the [Lease and Cash Management Agreement] or the operation of the Facility." Among such potential federal approvals was the approval contemplated by Section 81. Another potentially relevant federal statute was Section 2710(b)(2)(A), which calls for the Chairman of the National Indian Gaming Commission ("Gaming Commission") to approve "any tribal ordinance or resolution" involving Class II gaming on Indian lands.

B. Rescission of Tribe's Contract with NGV

Beginning in January 2004 Harrah's and Upstream Molate, LLC ("Upstream") partnered and

entered into negotiations to purchase 354 acres of land from the City of Richmond, California. Harrah's and Upstream intended to place that land in trust on behalf of the Tribe and to use the land to build a gaming facility that the Tribe would operate. According to NGV, Harrah's and Upstream began those negotiations despite knowing of the Tribe's pre-existing obligations to NGV.

On August 2, 2004 the Tribe—acting through its chairperson, Merlene Sanchez—sent a letter to NGV seeking to rescind their contract. Sanchez explained that the Tribe had submitted their contract to the Bureau of Indian Affairs ("Bureau") and the Gaming Commission for both agencies' approval under Sections 81 and 2710. Because the Gaming Commission had already informed the Tribe that its contract with NGV was illegal, Sanchez concluded that the Tribe had "no choice but to rescind the agreement."

Indeed, in a letter dated July 21, 2004 the Gaming Commission explained that the Tribe's contract with NGV violated Section 2710(b)(2)(A). It stated that "the Agreements evidence Developer's proprietary interest in the Tribe's gaming activity" and that such a proprietary interest contravened the Indian Gaming Regulatory Act ("IGRA").

Similar news came from the Bureau on April 13, 2005. After reviewing the Lease and Cash Management Agreement, that agency "concluded, as a matter of law, that the agreements must be approved by the Secretary under Section 81 in order for them to be valid and enforceable." Absent such approval, the Bureau explained, the contract was "unenforceable as a matter of law." Its conclusion, it noted, stemmed from information provided to it by attorneys for the Tribe "showing that the United States had

accepted at least three parcels in Mendocino County, California, into trust for the benefit of the Tribe in 1999." Those 44 acres had been accepted into trust in 1999 with the intention that they would be used by the Tribe for residential development, not a gaming facility. Based on the existence of the Mendocino County property the Bureau "determined that the Tribe has an interest in 'Indian land' as defined in §81(a)," and that interest was encumbered by its contractual provision with NGV that "affirmatively require[s] the Tribe to refrain from selling or disposing of any part of an interest the Tribe has in Indian land . . . so long as the agreements remain in effect."

In August 2004—before having received the Bureau's letter but after having received the Gaming Commission's decision—the Tribe officially entered into an agreement with Harrah's and Upstream to develop and manage the Tribe's proposed gaming facility. That agreement contained an indemnification clause requiring the Tribe to defend Harrah's against any future claims made by NGV.

C. Procedural History

NGV eventually filed suit against both Upstream and Harrah's in the federal district court, alleging that those two defendants had tortiously interfered with its existing contract with the Tribe. Later the Tribe filed its own lawsuit seeking declaratory and injunctive relief against NGV, asking to have the Lease and Cash Management Agreement declared invalid under applicable federal statutes. Both actions—NGV's against Upstream and Harrah's and the Tribe's against NGV —were later consolidated.

On July 28, 2005 the Tribe, Harrah's and Upstream all moved for summary judgment. NGV

responded by contesting the district court's subject matter jurisdiction. It claimed that there was no case or controversy between NGV and the Tribe, for NGV had assured the Tribe that it would not file an action against it. For its part the Tribe contended that there was subject matter jurisdiction based upon (1) the Tribe's obligation to indemnify Harrah's against claims made by NGV and (2) the Tribe's continuing interest in developing a gaming facility without fear of litigation.

On October 19, 2005 the district court granted the Tribe's motion for declaratory relief. In particular the court held that (1) it had subject matter jurisdiction over the Tribe's declaratory relief action; (2) Section 81 applied to contracts involving lands not yet acquired and not yet transferred into trust; and (3) because the Secretary of the Interior had not approved the Tribe's contract with NGV as required under Section 81, the contracts were invalid. As a result the district court granted the Tribe's motion. In so doing it also granted Harrah's and Upstream's motion for summary judgment, dismissing NGV's tortious interference claim as a matter of law because no valid contract existed between NGV and the Tribe.

NGV timely filed this appeal. While it was pending this court granted NGV's motion for the voluntary dismissal of Upstream from the matter because those two parties had settled. In addition, while this appeal was pending the Tribe and Harrah's terminated their contract and entered into a settlement agreement that provided in part for the Tribe's continued indemnification of Harrah's against claims made by NGV—but the Tribe acknowledges that its original contract with Harrah's (the one that spawned the termination and its continued indemnification under-

taking) lacked the approval necessary under Section 2710.

II. Standards of Review

We review both the existence of subject matter jurisdiction and a grant of summary judgment de novo (*Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1153-54 (9th Cir. 1998)). In reviewing the latter decision, we determine whether there are any genuine issues of material fact for trial, viewing the evidence in the light most favorable to the nonmovant (*Gammoh v. City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005)). We also review de novo the interpretation and construction of statutes (*Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1041 (9th Cir. 2001)), as well as the principles of contract interpretation as applied to the facts before us (*L.K. Comstock & Co. v. United Eng'rs & Constructors Inc.*, 880 F.2d 219, 221 (9th Cir. 1989)).

III. The Tribe's Claim Against NGV

We begin with the Tribe's effort to obtain a declaratory judgment, seeking a proclamation that its agreement with NGV was invalid because it had not been approved by the Secretary pursuant to Section 81 or, in the alternative, because it violated Section 2710. We have no occasion to decide the merits of those questions—at least not at this stage of this opinion[5]—because we conclude that the Tribe's efforts do not belong in the federal courts at all.

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[5] Because the Tribe and Harrah's advance the same substantive arguments as to why the agreement between the Tribe and NGV is invalid, and because there is no doubt that this court has subject matter jurisdiction over NGV's claim against Harrah's, we eventually reach the merits of the case (see Section IV)—we just do not do so in the context of the Tribe's claim.

It is undisputed that the Tribe's claimed adversary NGV has released it from any liability whatever, looking instead solely to a claim against Harrah's. And the Tribe has itself recognized that its management contract with Harrah's (which would have imposed on it an indemnification obligation covering NGV's claims against Harrah's) was void under Section 2705(a)(4) due to the Tribe's failure to have obtained approval of that contract by the Chairman of the Gaming Commission.[6] That being so, the Tribe cannot bootstrap itself into an Article III case or controversy vis-a-vis NGV by undertaking a new indemnification obligation as part of an agreement to terminate its already void contract with Harrah's—an indemnification promise that is wholly lacking in consideration and is hence itself invalid.[7]

In short, the Tribe—which does not itself face any potential liability to NGV—must try to fall back on its claimed sense of uncertainty about any future

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[6] Because the Tribe's agreement with Harrah's was subject to a different statutory provision from the section applicable to the Tribe's agreement with NGV, such Section 2705(a)(4) invalidity did not extend to the latter.

[7] It is most disturbing that the Tribe and Harrah's parted company by terminating their agreement back in *March* of 2007 but concealed that fact until oral argument of the case was almost upon us months later (remember that the terminated contract was the peg on which the Tribe sought to hang its jurisdictional hat). Now the Tribe seeks to supplement the record before us with material previously withheld both from NGV and from this Court in an effort to salvage its claim. But as indicated in the text, any claimed case or controversy as between the Tribe and NGV ceased to exist once *their* contract was terminated and NGV released the Tribe from any potential liability, given the invalidity of the original Tribe-Harrah's agreement that contained the claimed indemnification provision.

essays into the gambling industry. But those uncertainties exist only in outer space—they surely cannot be trotted out against NGV, with which the Tribe no longer has any contractual relationship or any ongoing exposure to liability. Instead such uncertainties raise wholly speculative concerns that call for a type of purely advisory opinion that federal courts are prohibited by the Constitution from giving to putative litigants (see, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 106-07, 110-11 (1983), holding that because Lyons could not show that he "faced a real and immediate threat of again being illegally choked," his claim was "speculative" in nature and therefore could not meet Article III's "case or controversy" requirement).

As already stated, that alone should operate to knock the Tribe out of the box in terms of standing to pursue its own litigation. This case scenario poses a dramatic contrast to litigation such as a patent case seeking a declaratory judgment (see, e.g., *Société de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 942-44 (9th Cir. 1981)), where there are two parties involved in the dispute with actual interests "of sufficient immediacy and reality" (*Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)), even though no infringement action has been brought.

If, as and when the Tribe chooses to engage in a future proposed entry into gambling activity with some other party and may then seek a declaration of its rights under a contract with *that* party, there may perhaps be federal subject matter jurisdiction to address that subject (a question that need not be answered here because it is purely hypothetical). But here, with the contractual relationship that once

bound NGV and the Tribe already having been terminated, there is no one on the other side of the "v." sign from the Tribe—and that is fatal in jurisdictional terms. We thus vacate the district court's decision to grant the Tribe the declaratory relief it sought.

IV. NGV's Claim Against Harrah's

We turn now to NGV's claim that Harrah's tortiously interfered with the contract that once bound NGV and the Tribe. Under California law "[t]he elements of a cause of action for intentional interference with contract are: (1) a valid contract between plaintiff and a third party; (2) defendants' knowledge of the contract; (3) defendants' intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage" (*Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist.*, 132 Cal. Reptr.2d 57, 73 (Cal. Ct. App. 2003)). At issue in this appeal is the first element of the tort: NGV contends that its contract with the Tribe was valid because it did not require approval under Section 81, while Harrah's argues that the contract was invalid precisely because it lacked such approval. In the alternative, Harrah's argues that the contract violated Section 2710, which requires that an "Indian tribe have the sole proprietary interest and responsibility for any gaming activity."

We address each of those arguments in turn, tackling the Section 81 inquiry first. That inquiry calls for a consideration of a number of factors, including the plain language of the statute, the role (if any) of 1 U.S.C. §1, relevant legislative history

and, of course, the actual language of the agreement that once bound NGV and the Tribe.

A. Plain Language of Section 81

Our analysis begins with the plain language of Section 81, not only because that is the natural starting point dictated by all accepted canons of statutory construction but also because the statute's unequivocal present-tense use of the word "is" does a tremendous amount of the legwork in settling one of the main questions raised on this appeal. In full Section 81(a) defines the term "Indian lands" as (emphases added):

> lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

Section 81(b) then prescribes:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

In this instance the Tribe-NGV contract was not within the purview of Section 81 because it plainly did not implicate "Indian lands" in statutory terms. Section 81(a)'s use of the present tense in defining "Indian lands" unambiguously prescribes that title to the real estate must *already* be held by the United States in trust for a tribe. Had Congress intended that Section 81 also extend to lands that might later be held in trust, it would have been the simplest of matters to word the statute differently. That it did

not do so is not a linguistic decision to be treated lightly (see *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003), explaining that "Congress's explicit decision to use one word over another in drafting a statute is material" and adding that "[i]t is a decision that is imbued with legal significance and should not be presumed to be random or devoid of meaning"; *Biehl v. CIR*, 351 F.3d 982, 987 (9th Cir. 2003), writing that courts "will not stretch the statutory language to cover a situation not contemplated by Congress").

Here the parties entered into their contract expressly contemplating—specifically intending—that land would later be identified and acquired and then still later transferred to the United States to be held in trust for the Tribe. But no such lands existed when the Tribe and NGV entered into their contract. Hence the portion of Section 81 that limits the duration of encumbrances on "Indian lands" is simply inapplicable to this case.

B. Role of the Dictionary Act in Interpreting Section 81

Contrary to the contention raised by the dissent, nothing in our reading of Section 81 contravenes 1 U.S.C. §1.[8] More commonly referred to as the Dictionary Act, that statute reads in relevant part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—

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[8] That statute was not adverted to by either party in the original briefing on the appeal (or for that matter before the district court). We invited input from the litigants on that score following oral argument, and each party has had ample opportunity to address through their supplemental briefing the question of what if any effect the Dictionary Act has on the interpretation of Section 81.

. . . .

> words used in the present tense include the future as well as the present.

Focusing upon the phrase "words used in the present tense include the future as well as the present," the dissent asserts that the word "is" as used in Section 81(a) encompasses *both* lands that are currently held in trust by the United States for an Indian tribe *and* lands that might eventually be held in similar fashion. But in so doing, the dissent fails to grapple adequately with (1) the Supreme Court's repeated instructions regarding proper statutory construction and (2) the directive in the Dictionary Act itself that compels us to consider first the "context" of the statute.

First, the Supreme Court has not once invoked the Dictionary Act in an effort to convert an unambiguous verb tense into claimed ambiguity, let alone then going on to employ that manufactured ambiguity as a stepping stone to altering the plain sense of a statute.[9] Here is the succinct directive in *United*

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[9] On those limited occasions that the Supreme Court has turned to the Dictionary Act, it has done so to illustrate better the meaning of the word "person," which the statute defines as "includ[ing] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" (see, e.g., *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 713 n.1 (2003) (Stevens, J., concurring in judgment); *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 196 (1993); *Ngiraingas v. Sanchez*, 495 U.S. 182, 190-91 (1990); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 69 (1989)). We ourselves have relied on the Dictionary Act for the same purpose (see *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000)). And on one other occasion we have relied on the Dictionary Act simply to corroborate an independent conclusion—derived solely from "the

States v. Wilson, 503 U.S. 329, 333 (1992) and the cases that it cites:

> Congress' use of a verb tense is significant in construing statutes. See, e.g., *Otte v. United States*, 419 U.S. 43, 49-50 (1974); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64, n.4 (1987).

Similarly, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) made clear that in "all statutory construction cases, we begin with the language of the statute." Inquiries into the meaning of a statute come to an end "if the statutory language is unambiguous and the statutory scheme is coherent and consistent" (*id.*, quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (internal quotation marks omitted)). Given the specific and unambiguous manner in which Section 81(a) defines the term "Indian lands," it is not apparent why the Dictionary Act must even be consulted.

Second, even on its own terms the Dictionary Act supports the analysis here: It looks first to "context," and only if the "context" leaves the meaning open to interpretation does the default provision come into play. As defined by *Rowland*, 506 U.S. at 199-200 (alterations in original, emphasis added):

> "Context" here means the text of the Act of Congress surrounding the word at issue, *or the texts of other related congressional Acts*, and this is simply an instance of the word's ordinary

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plain language of the statute"—that a criminal statute written in the present tense cannot be used to penalize past behavior (*United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007)). Because none of those cases approaches the situation presented here, none affects this decision.

> meaning: "[t]he part or parts of a discourse preceding or following a 'text' or passage or a word, or so intimately associated with it as to throw light upon its meaning." Webster's New International Dictionary 576 (2d ed. 1942). While "context" can carry a secondary meaning of "[a]ssociated surroundings, whether material or mental," *ibid.*, we doubt that the broader sense applies here.

And *Rowland, id.* at 199 went on to explain that the word "indicates" broadens the scope of the inquiry that a court must make (id. at 200):

> If "context" thus has a narrow compass, the "indication" contemplated by 1 U.S.C. §1 has a broader one. The Dictionary Act's very reference to contextual "indication" bespeaks something more than an express contrary definition, and courts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act; ordinary rules of statutory construction would prefer the specific definition over the Dictionary Act's general one. Where a court needs help is in the awkward case where Congress provides no particular definition, but the definition in 1 U.S.C. §1 seems not to fit.[10] There it is that the qualification "unless the context indicates otherwise" has a real job to do,

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[10] [Footnote by this Court] Of course that observation alone further strengthens our original position that the Dictionary Act need not even be considered, given that Congress *did* provide a specific definition of the term "Indian lands" in Section 81(a). We nonetheless continue down this analytical path so as to respond to the dissent's argument on its own terms.

> in excusing the court from forcing a square peg into a round hole.

With that guidance in mind, we consider a series of congressional acts related to Section 81—specifically, Sections 465, 2719 and 271—that clearly avoid an "awkward" rendering of Section 81.

Sections 465 and 2719 are particularly instructive, for they respond directly to the dissent's concern that construing Section 81 so that it applies only to contracts involving lands already in trust would allow parties to evade federal review entirely. Manipulative parties, the dissent fears, could take advantage of such an interpretation by carefully orchestrating the timing of any agreement so that any provision encumbering Indian lands would be executed only before placing land in trust. But such fears are more than adequately assuaged by the existence of Sections 465 and 2719, both of which guarantee that a contract such as the one that NGV and the Tribe had entered into can never escape the federal government's attention.

First, Section 465 (already quoted in n.4) and its implementing regulations set forth an extensive review process that the Secretary of the Interior must undertake *before* taking lands into trust (see, e.g., 25 C.F.R. §§151.3, 151.11(c); Larry E. Scrivner, *Acquiring Land into Trust for Indian Tribes*, 37 NEW ENG. L. REV. 603, 606-07 (2003) ("Scrivner"),[11] describing the trust application process and the Secretary's duty to investigate, among other things, the purpose for which the land will be used and the effect that placing the land into trust will have on the tax

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[11] At the time Scrivner authored that piece, he was serving as acting director of the Bureau's Office of Trust Responsibilities.

bases of local government; Mary Jane Sheppard, *Taking Indian Land Into Trust*, 44 S.D. L. REV. 681, 687-88 (1998-99) ("Sheppard"),[12] similarly describing the comprehensive nature of a Section 465 review). During such a review a tribe is first required to address, among other issues, its need for the land, the purpose for which the land will be used, the effect that taking the land into trust would have on state and local political subdivisions and whether a decision to take the land into trust would comply with the National Environmental Policy Act (see Scrivner, 37 NEW ENG. L. REV. at 606). With that initial information in hand, the Department of the Interior then gives state and local governments the opportunity to object to the tribe's application through "evidentiary documentation" demonstrating why taking the land into trust would "impact[ ] their jurisdiction or their tax base" (*id.* at 607). Only after all sides have provided their input does the Department begin its own independent examination of the trust application, a process that "requires a thorough analysis of all the facts and documentation, environmental clearances, archaeological studies, and all of the things that weigh into the action" (*id.*). Any final decision is subject both to a similarly extensive administrative appeals process and to a subsequent review in the federal courts (*id.*).

And relatedly, in cases where the tribe intends to use lands transferred into trust for gaming purposes, Section 2719(b)(1)(A) requires that the Secretary first "determine[ ] that a gaming establishment . . . would be in the best interest of the Indian tribe and its

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[12] Sheppard has previously served as a staff attorney for the Gaming Commission and for the Division of Indian Affairs, Office of the Solicitor in the Department of the Interior.

members, and would not be detrimental to the surrounding community" (see also Sheppard, 44 S.D. L. REV. at 687). In short, any concern that NGV was trying to game the system by executing its contract with the Tribe before transferring land into trust is wholly unfounded. Instead any *later* effort to take lands into trust triggers an extensive review process by the Secretary—a review that is far more meaningful than any Section 81 proceeding that would deal with not-yet-identified lands that might be taken into trust in the future, because a Section 465 proceeding addresses the suitability of a *specific* parcel of land in *all* respects, rather than the totally speculative process that is necessarily involved when a presently unknown future acquisition is sought to be made the subject of an attempted analysis.

Sections 2710(d)(3)(A) and 2710(d)(7) also help illuminate the meaning of Section 81, particularly because both are part and parcel of IGRA, which defines "Indian lands" in much the same manner as Section 81 (see Section 2703(4)(B) (emphasis added), defining "Indian lands" in part as "any lands title to which is held in trust by the United States for the benefit of any Indian tribe . . . ."). Section 2710(d)(3)(A) provides:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities.

If any State should fail to enter into such negotiations, Section 2710(d)(7) provides the Indian tribe with a series of remedies, including the right to

initiate an action against the State in federal district court. But to bring such an action, as the Sixth Circuit has held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002), the Indian tribe must show that it has "Indian lands" as defined by IGRA at the time of filing. *Match-E-Be-Nash-She-Wish, id.* spelled out the rationale underlying its conclusion in terms that bear considerably on the Section 81 question now before us:

> Under § 2710(d)(3)(A), it is clear that the State does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands. The purposes of this requirement appear to be to ensure that the casino will be inside the borders of the State, to give the State notice of where it will be, and to require the tribe to have a place for the casino that has been federally approved. If the Indian tribe does not have any land in the State that can be used for a casino, why should the State waste its time negotiating about such a casino? In the absence of a location, the State would have no way to assess the environmental, safety, traffic, and other problems that such a casino could pose.

Accord, Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger, No. Civ. S-03-2327WBS/GGH, 2004 WL 1103021, at *5 (E.D. Cal. Mar. 12, 2004).

Given those practical concerns, it is no wonder that the Bureau's policy has been to review contracts under Section 81 only when they involve lands currently held in trust by the United States. That policy is evinced by the Bureau's own April 13, 2005 letter to the Tribe, which made clear that its con-

clusion that the NGV-Tribe agreement was invalid for lack of Section 81 approval was predicated on the Tribe's lawyers having alerted the Bureau to its Mendocino County property, not to the possibility of acquiring future trust lands.[13]

That same policy is further confirmed through an affidavit included in the record by NGV from Kevin Gover ("Gover"), a former Assistant Secretary for Indian Affairs. Gover attests that during his tenure from late 1997 to early 2001, "it was not the [Bureau's] policy or practice to review contracts to determine whether such contracts fall within the scope of 25 U.S.C. §81(b) . . . in the absence of the existence of trust lands." Instead, in cases "where the purpose of the contract between a developer and a tribe [was] to assist the tribe in acquiring real property, and petitioning the United States to accept title to such property in trust for the benefit of the tribe," the Bureau's review would be done pursuant to the regulations implementing Section 465. As Gover puts it: "[t]he Secretary's acceptance of title to the subject property in trust for the petitioning tribe

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[13] In that letter the Bureau wrote that "[a]t an earlier stage of our review, it was not clear whether the United States held title to any land in trust for the benefit of the Tribe, and, *as a consequence*, whether the agreements covered any 'Indian land' as defined in 25 U.S.C. §81(a)" (emphasis added)). Thus the Bureau concluded that Section 81 applied to NGV's contract with the Tribe only after "[a]ttorneys for the Tribe . . . provided [the agency] with documents showing that the United States accepted at least three parcels in Mendocino County, California, into trust for the benefit of the Tribe in 1999." If the Bureau had viewed Section 81 as applying to contracts involving lands that would *later* be transferred into trust, the existence of the Mendocino County property would have been irrelevant to its analysis of the NGV-Tribe contract.

subsumes all approvals required under Federal law." And as all of that applies to the facts before us, the fact that the Tribe and NGV would eventually have to undergo Section 465 review if their later-acquired lands were to be transferred into trust obviated any need to have their contract approved under Section 81.

In conclusion, there is no reason to resort to the Dictionary Act's default rules of statutory interpresentation. Instead the context here clearly indicates that Section 81 is limited only to reviewing those contracts involving presently held trust lands.

C. Legislative History of Section 81

Our literal reading of Section 81 is further corroborated by the statute's legislative history.[14] In seeking to persuade us to read Section 81 other than in plain-language terms, Harrah's points to some cases that, it claims, identify a legislative history of Section 81 that supports a nonliteral reading. We have reviewed those cases as well as the pertinent legislative history, and we conclude that those sources not only fail to support the position advanced by Harrah's but that they instead further corroborate our own plain-language statutory reading.

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[14] To be sure, *Rowland*, 506 U.S. at 199 does not treat legislative history as part of the "context" of a congressional act as that word is used in the Dictionary Act. But legislative history of course remains a frequently-relied-upon additional tool of statutory interpretation (see, e.g., *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1111 (9th Cir. 2007), explaining that its plain-language interpretation of the statute at issue was also "supported by legislative history"). And it seems particularly appropriate to consider the legislative history of Section 81 here, when each of the parties has sought to bolster its arguments with that information.

Thus Harrah's seeks to call to its aid *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), but that case significantly couched its view in terms that federal statutes relating to Indian tribes "are to be construed liberally in favor of the Indians, *with ambiguous provisions interpreted to their benefit*" (emphasis added). Here that proposition does not aid Harrah's, for Section 81's present-tense wording leaves no room for ambiguity.[15] Indeed, even the *Blackfeet Tribe* concept of liberal construction "in favor of the Indians" does not call for a nonliteral reading of Section 81(b), for requiring that more—rather than fewer—contracts be approved under Section 81(b) "would frustrate Indian tribes' efforts to promote economic development and fiscal autonomy" (*Penobscot Indian Nation v. Key Bank of Me.*, 112 F.3d 538, 554 (1st Cir. 1997), adding that the court's "analysis reflects the modern trend in federal Indian policy away from outmoded paternalistic practices and policies").

Section 81's own evolution confirms the advent of that more modern attitude toward Indian tribes, a perspective that the dissent does not acknowledge. That statute was originally enacted in 1872 to

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[15] Even less (if indeed any) weight is to be ascribed to the comparable language employed in *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986), also sought to be relied on by appellees. *A.K. Mgmt.* involved an earlier and substantively different version of Section 81—one that did not speak of "encumber[ing] Indian lands," but rather of agreements made with Indians that were "relative to their lands" (see 25 U.S.C. §81 as it existed until the year 2000). Moreover, *A.K. Mgmt.* involved a dispute over land that was already held in trust by the United States for an Indian tribe. For more than one reason, then, that case does not at all influence today's outcome.

"reflect[ ] Congressional concerns that Indians, either individually or collectively, were incapable of protecting themselves from fraud in the conduct of their economic affairs" (see S. REP. NO. 106-150, at 2 (1999), adding that "[t]he first and principal need then was that [Indians] should be shielded alike from their own improvidence and the spoliation of others"). But in 1934 Congress shifted the focus of its Indian policy by enacting the Indian Reorganization Act ("Reorganization Act") that "represented a fundamental break with [the] policy" underlying Section 81 (see *id.*). As the 1999 Senate Report, *id.* (alteration in original and internal quotation marks omitted) went on to say:

> The intent and purpose of the [Reorganization Act] was to develop the initiative destroyed by a century of oppression and paternalism . . . . [It] seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property.

Following passage of the Reorganization Act, administrative agencies and courts were left "with the difficult task of reconciling an 1872 statute that sought to protect Indian tribes by imposing extensive federal oversight with a 1934 Act intended to disentangle the tribes from official bureaucracy" (*id.* (internal citation omitted)). Fortunately Congress simplified that task in 1999 when it amended Section 81. Those amendments—which, among other changes, replaced the term "relative to" Indian lands with "encumbers" Indian lands[16]—"ensure[d] that Indian tribes will be able to engage in a wide array of

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[16] See n. 15.

commercial transactions without having to submit those agreements to the BIA as a precaution" (*id.* at 9; see also *id.*, expressly noting that the 1999 amendment "eliminated the overly-broad scope" of Section 81).

Put simply, the tables have turned since 1872. Although at an earlier point courts may have been able to use the *Black-feet Tribe* presumption to justify a nonliteral expansion of Section 81, certainly the most recent amendment to that statute makes clear that Congress now considers selfdetermination—not paternalism—to be in the Indians' best interest. And that goal is more directly advanced by a literal rather than a nonliteral reading of Section 81.

D. Language of the Lease and Mendocino County Property

With all of that said, we turn now to the actual language of the Lease to demonstrate that under the literal present-tense reading of Section 81, it does not apply to the only lands that the United States already held in trust for the Tribe's benefit at the time the Tribe-NGV agreement was entered into. Taking issue with our addressing the specifics of the contract, the dissent argues that this is a task best left in the first instance to the district court, particularly when "parol evidence" is involved. But our reading is based on the words of the contract itself (see n.17), and contract interpretation has always been a matter of pure law that needs no preliminary screening by the district court. And our reference to the contract directly addresses Harrah's argument—indeed the primary one that it has raised on appeal—that the Lease implicates the Mendocino County, California property already held in trust for the Tribe. Because it is exceedingly plain that neither

the Tribe nor NGV ever contemplated that the document would extend to the Mendocino County lands, we hold that the agreement binding those two parties was valid without the Secretary's approval.

It is of course true that the Tribe's 44 acres in Mendocino County qualify as "Indian lands" as that term is defined by Section 81. And it is equally true that such acreage was taken into trust by the United States for the benefit of the Tribe in 1999, well before NGV and the Tribe formalized their business relationship. But the Mendocino County land issue is really a red herring: Both the unambiguous language of the Lease and, at least as importantly, the equally unambiguous facts as to that property itself confirm that the Mendocino County lands are not at all within the purview of the parties' transaction and were therefore not even arguably encumbered by the Lease.

Under the terms of the Lease, NGV and the Tribe partnered not to develop a casino on existing tribal land, but because the Tribe "require[d] assistance . . . *acquiring real property and petitioning the United States to accept title to such property in trust* for the benefit of the Tribe" (emphasis added). With the Mendocino County property already in hand —and having been accepted into trust—when the parties entered into their deal, the Lease cannot fairly be read as providing (or even contemplating) that such property would or could become the eventual site of the casino. It would make no sense at all, of course, to speak of "acquiring" already-owned real property. And it must be remembered that the Mendocino County property had been acquired expressly for residential development, *not* for commercial development. Nothing suggests that such purpose had

changed in any respect either before or at the time that NGV and the Tribe entered into their agreement.

Additional language from the Lease further supports our conclusion. According to the Lease's "Master Definitions List," "Trust Lands" is described as:

> Property held by the United States in Trust for the benefit of the Tribe.

"Property" is in turn defined in terms of the future, not the present (emphasis added):

> The real property upon which the Structure will be constructed by Developer, which *at the time of construction will be titled to the United States in trust for the benefit of the Tribe*.

"Structure" is similarly defined as:

> The buildings and improvements constructed and installed on the Trust Lands on which the Tribe operates the Facility.

And finally, "Facility" is defined as:

> The Structure, equipped and ready for the Tribe to conduct Gaming for the public.

With that definitional chain, the Lease provision sought to be relied on by Harrah's cannot reasonably be read as embracing the Tribe's acreage in Mendocino County. If that were to be done, "Property" would not be defined only in the future tense and "Structure" and "Facility" would not be defined in terms of a public gaming facility rather than private housing. In short, because the Mendocino County property was already held in trust and because it had been specifically slated—and remained slated—for residential development, that property simply does

not come within the provision of the Lease restricting the Tribe's ability to alienate "Trust Lands."[17]

E. Inapplicability of Section 2710

To this point we have demonstrated in a number of different ways why Section 81 is inapplicable to the situation before us. But finally we soldier on to speak far more briefly to the substantially more attenuated possibility that the parties' agreement could somehow have violated Section 2710. As before, that inquiry begins by recourse to the plain statutory language. And by its express terms, Section 2710 pertains only to tribal ordinances or resolutions—not to a tribe's contract with a third party—so that nothing in that statute impairs the validity of the Tribe-NGV agreement.

Under Section 2710(b)(2)(A)(emphases added) the Chairman of the Gaming Commission:

> shall approve *any tribal ordinance or resolution* concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if *such ordinance or resolution* provides that—
>
> (A) . . . . the Indian tribe will have the *sole proprietary interest* and responsibility for the conduct of any gaming activity . . .

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[17] It is worth noting that NGV maintains that a deposition of Sanchez, which is included in the record, further bolsters its position that the parties never intended their agreement to cover the Mendocino County property. On appeal the parties have vigorously disputed whether we should consider such parol evidence in interpreting their agreement. Because of the clarity of the matters already discussed, we have felt no need to look to the deposition and, as a result, no need to resolve the parties' disagreement over the propriety of parol evidence.

On appeal Harrah's argues that NGV's agreement with the Tribe violated that statute because the terms of the Lease allowed NGV to assume the dominant equity interest in the eventual gaming facility. That arrangement, it contends, is concomitant to NGV having a "sole proprietary interest" in the gaming facility.

But Section 2710's plain language refutes that notion because Harrah's conclusion rests on a false premise. Here there was no "tribal ordinance or resolution" (note that the statute's implementing regulations likewise refer to "gaming ordinance or resolution *adopted by a tribe*" (see 25 C.F.R. § 522.1 (emphasis added)). That language simply does not speak to *contracts* entered into between a tribe and a third party (as contrasted with tribal legislation or regulations officially enacted by the tribe). That reading is further fortified by the sharp contrast between Section 2710 and Section 2705(a), a related statute that speaks of *both* "tribal ordinances or resolutions" and a specific type of contract that a tribe may enter into with a third party.[18] Thus the Tribe's agreement with NGV cannot be said to violate Section 2710 either.[19]

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[18] Under Sections 2705(a)(3) and (4)(emphases added) the Chairman of the Gaming Commission can:

> (3) approve *tribal ordinances or resolutions* regulating class II gaming and class III gaming as provided in section 2710 of this title; and
>
> (4) approve *management contracts* for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

[19] We note that nothing in the record indicates that the Tribe forwarded a tribal ordinance or resolution to the Gaming Commission for it to review, or even that any such ordinance or

V. Conclusion

We first vacate the judgment in the Tribe's declaratory judgment action against NGV and dismiss that action for lack of subject matter jurisdiction. As the Tribe's contracts with both NGV and Harrah's have been rescinded, there is no "case or controversy" at issue as between the Tribe and NGV, leaving us with no federal jurisdiction on that score.

We further hold that Section 81 requires approval by the Secretary as to only those contracts that implicate lands already held in trust by the United States for an Indian tribe. Because the contract between the Tribe and NGV did not implicate such lands, it remained valid without such approval. We further hold that the same contract also did not violate Section 2710, for that statute pertains only to tribal ordinances and resolutions, not to a tribe's agreement with a third party. All of those things being true, we reverse the judgment in Harrah's favor and remand for resolution of NGV's action against Harrah's on the merits.

VACATED IN PART; REVERSED AND REMANDED IN PART.

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resolution existed. Instead the record reflects that the Tribe's chairperson forwarded the Lease and Cash Management Agreement to the agency.

N.R. SMITH, *Circuit Judge*, dissenting:

I respectfully dissent for the following reasons. First, the majority rejects the clear and unambiguous will of Congress in its application of 25 U.S.C. § 81. Second, because of its error in the application of 25 U.S.C. § 81, the majority is thereafter forced to reverse the district court by (1) interpreting contracts that the district court did not review; (2) making its own determination that the contracts were unambiguous; (3) using parol evidence to interpret the contract even though it finds that the contracts were unambiguous; and (4) picking and choosing which parol evidence on which to rely, even though the district court had not addressed the issues of whether to admit parol evidence and, if so, what evidence to admit. I would instead affirm the district court's summary judgment decision dismissing NGV's tortious interference complaint against Harrah's and dismiss the appeal for declaratory relief filed by the Tribe as moot.

I.

"The doctrine that the federal government stands in a fiduciary relationship to Native Americans has been a part of our common law since the early days of the Republic." *Eric v. Sec'y of HUD*, 464 F. Supp. 44, 46 (D. Alaska 1978) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831)). "Over the years courts at all levels have sustained the doctrine that in its relations with Native peoples the government owes a special duty analogous to those of a trustee." *Id.* (citing *Heckman v. United States*, 224 U.S. 413 (1912); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Redfox v. Redfox*, 564 F.2d 361, 365 (9th Cir. 1977); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238

(N.D. Cal. 1973)). This is a "unique relationship between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the U. S. Code pertains only to Indians." *Id.* (quoting *White v. Califano*, 437 F. Supp. 543, 555 (D.S. D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978)).

Consistent with this special duty, Congress enacted 25 U.S.C. § 81 "to protect the Indians from improvident and unconscionable contracts" in 1872. *In re Sanborn*, 148 U.S. 222, 227 (1893). Since that time, Congress has amended § 81, removing provisions that were antiquated and unnecessary. *See* H.R. Rep. 106-501. The present language of § 81(b) states:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

The term "Indian lands" is defined by § 81(a) as: "lands the title to which is held by the United States in trust for an Indian tribe." 25 U.S.C. § 81(a). (hereafter referred to as "trust lands"). To decide this case, we must apply § 81 to the parties' contracts.

"In interpreting a statute, we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) (quoting *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999)). When a statutory term is undefined, we endeavor to give that term its ordinary meaning. *Id.* We are instructed to avoid, if possible, an interpretation that would produce "an absurd and

unjust result which Congress could not have intended." *Id.* (quoting *Clinton v. City of New York*, 524 U.S. 417, 429, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998)).

In the Dictionary Act, Congress mandated that, in determining the meaning of any Act of Congress, "unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. Thus, when interpreting the definition of "Indian lands" in § 81, we must read the words "which is held in trust . . ." to also include land "which will be held in trust . . . ." *Id.*

Recent Congressional discussion of the purpose of § 81 supports such a reading. Section 81 "is intended to protect Indians from improvident contracts and is concerned primarily with federal control over contracts between Indian tribes or individual Indians and non-Indians." *See* H.R. Rep. 106-501. Congress clearly does not want Indian tribes to enter into contracts that would encumber their trust lands for seven years or more, without the added protection of the Secretary of the Interior's approval. Limiting § 81's definition of Indian lands to only the present tense—land which "*is* held in trust"—undermines the protection § 81 is intended to provide to the Indian tribes. Under the majority's reading of § 81, parties can easily circumvent the statute. The parties, fully intending that their contract will encumber Indian lands for more than seven years, can simply execute their contract before the lands are conveyed into trust. Because such a contract would not pertain to land *presently* held in trust by the United States for an Indian tribe, the contract would not require the approval of the Secretary of the Interior. This would be true even though the parties always intended that

the land would be held in trust by the United States for the Indian tribe and even if the contract contained an explicit provision requiring that the land be held in trust by the United States for the Indian tribe.

Longstanding Supreme Court and Ninth Circuit precedent concerning the regulation of Indian land transactions also supports reading § 81 to include the future tense. The United States Supreme Court has made clear that "the canons of construction applicable to Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). One of those cannons of construction is that federal statutes relating to Indian tribes must be "construed liberally in favor of the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). This court has previously written, "Until Congress repeals or amends the Indian . . . statutes . . . we must give them a 'sweep as broad as [their] language' and interpret them in light of the intent of the Congress that enacted them." *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 787 (9th Cir. 1986) (quoting *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 166 (1980)). Reading § 81 to include the future tense furthers both the intent of Congress and the direction of the Supreme Court that we must construe statutes broadly in favor of the Indian tribes.

Applying the plain language of § 81 to the contract between the Tribe and NGV is a straightforward exercise. The Tribe and NGV entered into contracts regarding lands which are or will be held in trust for seven or more years. Based upon the provisions of § 81, the Tribe applied for approval of these con-

tracts. However, the Secretary of the Interior did not approve the contracts. Thus, under the plain language of § 81, they are invalid. 25 U.S.C. § 81. Because the contracts are invalid, NGV cannot establish the first element of its tortious interference cause of action against Harrah's. *Quelimane Co. v. Stewart Title Guaranty Co.*, 960 P.2d 513, 530 (Cal. 1998) (stating that the first element of an intentional interference with contractual relations action is "a valid contract between plaintiff and a third party").

To contradict this clear and unambiguous reading of § 81, the majority first declares that the Dictionary Act only applies when a statute is ambiguous. However, the majority cites no authority for this argument, because there is none. Congress enacted the Dictionary Act and installed it as its first act, 1 U.S.C. § 1, controlling the meaning of the words of any and all Acts of Congress. Nothing in the United States Code or controlling precedent limits the Dictionary Act's application.

Understanding the weakness of their argument, the majority next seizes upon the language of the Dictionary Act and argues that the context of the § 81 precludes the use of the future tense. Context is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). However, the words of § 81 do not provide a different context. There is no finding in the majority opinion or arguments in the briefs of the parties suggesting that the words of the statute surrounding "which is held" provide a different context. Instead, the majority suggests that 25 U.S.C. §§ 465, 2710, and 2719 (other congressional acts) provide the "context" to reject reading § 81 to include

the future tense, as mandated by the Dictionary Act. Again, the majority cites no Supreme Court or circuit precedent to buttress their argument that these sections were enacted to change the context of § 81.

The sections cited by the majority provide additional protections to the Indian tribes and their lands, but provide no support for the proposition that the Dictionary Act should not apply to § 81. However, Congress can pass more than one Act to assist Indian tribes. Section 81 applies to all contracts and agreements with Indian tribes which encumber Indian trust lands. Under § 81, the Secretary must determine: (1) whether the contract will encumber presently held or to be acquired trust land for a period of seven or more years; and (2) whether the contract is improvident and unconscionable. 25 U.S.C. § 81. None of the language in sections 465, 2710, or 2719 even addresses contracts encumbering Indian lands, much less provides a context suggesting that § 81 can include only the present tense.

Section 465 authorizes the Secretary "to acquire . . . any interest in lands, water rights, or surface rights to lands within or without existing reservations . . . for the purposes of providing land for Indians." 25 U.S.C. § 465. Nothing in that section even remotely addresses determining the fairness of contracts, between Indian tribes and some other party, which will encumber Indian lands. *Id.; see also* 25 C.F.R. §§ 151.10, 151.11. Section 2701 *et seq.*, which includes § 2710, applies to the approval of gaming contracts, not contracts encumbering Indian lands. Additionally, these sections use a different definition of the term "Indian Lands" than does § 81. Indian lands under these sections includes "all lands within the limits of any Indian reservation *and* any

lands to which title is either held in trust by the United States . . . or held by any Indian tribe or individual subject to restrictions by the United States . . . over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4) (emphasis added). Section 2719(b)(1)(A) is likewise limited to gaming contracts, and requires the Secretary to determine whether a gaming establishment would be in the best interest of the Indian tribe and whether it would be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A).

The majority next argues that Congress could have drafted § 81 to include the future tense, if that were its intent. However, the Dictionary Act provides that all present tense words used in Acts of Congress include the future tense. *See* 1 U.S.C. § 1. Because we presume that Congress is knowledgeable about existing law when it passes new legislation, we must presume that Congress was aware of the Dictionary Act when it enacted § 81. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Thus, there is simply no reason for Congress to draft a statute with language in both present and future tense. In fact, drafting in this way would be illogical given that the Dictionary Act already addresses the future tense in "any Act of Congress." 1 U.S.C. § 1.

The majority's opinion also implies that the statutory language in the Dictionary Act is hoary, because the Supreme Court has only applied the Dictionary Act to illustrate the meaning of the word "person." Acts of Congress, however, are not presumed invalid until declared so by the Supreme Court. Simply because the Supreme Court has not yet addressed this issue does not affect the application of the Dictionary Act to the facts of this case.

Lastly, the majority relies on what it terms a "more modern attitude toward Indian tribes" to justify its reading of § 81. However, our job is not to legislate to reflect modern attitudes. Our job is, instead to interpret statutes as they have been written. It is Congress's place, not ours, to decide whether modern attitudes dictate that § 81 be repealed (as this opinion does). Until the time that Congress does so, we are bound by the current language of § 81.

The contracts between the Tribe and NGV are subject to § 81 and require approval by the Secretary of the Interior. Because the contracts were not approved, the contracts were invalid and unenforceable. NGV's tortious interference cause of action therefore fails and must be dismissed.

II.

The Tribe and Harrah's filed summary judgment motions, asserting that the language of the contracts between the Tribe and NGV encumbered presently owned trust lands thereby requiring Secretary approval under § 81. NGV opposed the motion, also citing the language of the contracts. Thereafter, NGV requested permission to file a surreply to provide the court with additional evidence in support of its position that the contracts did not encumber trust lands. Both Harrah's and the Tribe opposed the motion and, alternatively, requested that they be able to respond to NGV's surreply, if it were allowed. The district court refused to allow the surreply. However in its refusal, the district court noted, "The Court has reviewed the surreply filed by NGV. The Court finds that NGV has submitted evidence concerning issues of fact. Because the Court bases its decision on an issue of law, it finds it unnecessary to address the contentions contained in the surreply."

Guidiville Band of Pomo Indians v. NGV Gaming Ltd., 2005 WL 5503031 at 1, n.1 (N.D. Cal. 2005). Given these circumstances, it is error for this court to pick and choose what parol evidence it will use in reversing the district court's decision on an issue that the district court did not even address. Instead, we should remand this issue to the district court so that it may make a factual finding regarding whether the terms of the contracts between the Tribe and NGV are ambiguous.

A.

In interpreting a contract under California law, a court must first look to the plain meaning of the contract's language. *See* Cal. Civ. Code §§ 1638, 1644. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible[.]" Cal. Civ. Code § 1639. California law holds that "even if the trial court personally finds the document not to be ambiguous, it should preliminarily consider all credible evidence to ascertain the intent of the parties." *Appleton v. Waessil*, 32 Cal. Rptr. 2d 676, 678 (Cal. Ct. App. 1994). In such cases, the district court engages in a two-step process: "First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step-interpreting the contract." *Winet v. Price*, 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992).

The district court had no opportunity to interpret the language of these contracts. Instead, it decided a

question of law regarding § 81. Because the district court acknowledged that factual issues exist with regard to the contracts' interpretation, the district court is in a better position to "make these determinations in the first instance." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Notwithstanding that the district court never reached the analysis set forth in *Winet*, the majority finds that the language of the Tribe/NGV Lease is unambiguous. However, in doing so, the majority picks and chooses what parol evidence it will consider rather than remanding to the district court so that it may determine, in the first instance, whether the terms of the contract are ambiguous. For example, the majority uses parol evidence to (1) ascertain that neither of the parties ever contemplated that the Lease would extend to already owned trust land (the Medocino County property); and (2) state that "equally unambiguous facts as to that property itself confirm that the Medocino County lands are not at all within the purview of the parties' transaction." The majority also cites to the Bureau of Indian Affairs letters to buttress its finding regarding the language of the Lease.

I reject the idea that appellate courts may rely upon parol evidence which was not fully presented by the parties to the district court in order to reverse the district court. An appellate court's application of parol evidence to interpret contractual terms is not a substitute for a full hearing before the district court in which the district court can consider all of the evidence. This is particularly true under California law, which requires a district court to first make a finding about whether the contract is ambiguous and allows the admission of parol evidence only if the

contract is, in fact, ambiguous. See Winet, 6 Cal. Rptr. 2d at 557. If the contract is unambiguous, an appellate court should interpret the contract based on its language alone. Cal. Civ. Code § 1639. It is not appropriate for appellate courts to make a determination in the first instance about whether the contract is ambiguous and it is even less appropriate for appellate courts to determine what parol evidence, if any, to consider. Therefore, I would remand to the district court for it to make a determination in the first instance as to whether the contracts between the Tribe and NGV are ambiguous, and, if so, what parol evidence to admit. This is consistent with the process provided for by California law. *See Winet*, 6 Cal. Rptr. 2d at 557; *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, 442 P.2d 641, 644 (Cal. 1968) ("The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.")

B.

The majority also ignores the rules of contract interpretation in reaching its result. Section 81's plain language requires any contract encumbering Indian lands for a period of seven years or more to get approval. 25 U.S.C. § 1. There is no dispute that the Lease "encumbers" land which the lease defines as "Trust Lands." *See* 25 C.F.R. § 84.002 ("Encumber means to attach a claim, lien, right of entry or liability to real property"). Pursuant to the terms of the Lease, so long as any of the Tribe's obligations to NGV remain outstanding, the Tribe cannot sell, dispose of, lease, assign, sublet, transfer, mortgage or

encumber all or any part of its title, or interest in or to the "Trust Lands," as defined in the parties' contracts, without the prior written consent of NGV. The Lease also grants NGV, its agents, employees, and independent contractors a right of entry on Indian trust lands, with "complete and unrestricted access . . . for purposes of developing, installing and constructing the Structure." Thus, we must determine whether the defined term "Trust Lands" used in the Lease encompasses Indian lands such that § 81's approval requirement would apply.

In the parties' Master Definitions List, which applies to both the Lease and the parties' other contract, the parties defined the term "Trust Lands" as "Property held by the United States in Trust for the benefit of the Tribe." Applying § 81 to this definition, the Lease encumbers Indian lands. The Lease's definition of "Trust Lands" includes all of the property held by the United States in trust for the benefit of the Tribe, with no exceptions. Thus, even if the majority is correct that § 81 only applies to lands *presently* held in trust, the Lease encumbers such land. Thus, the Lease needed to be approved by the Secretary of the Interior. 25 U. S.C. § 81(b). Because it was not, the Lease is invalid.

The majority attempts to skirt § 81's approval requirement by suggesting that the Lease's definition of "Trust Lands" only applies to property which will be acquired in the future. The majority asserts that the sequence in which terms are defined in the Master Definitions List makes it clear that the use of the word "Property" in the definition of "Trust Lands" is limited to the defined term "Property," which is also included in the Master Definitions List. Thus, the majority believes that the term "Trust Lands"

includes only the specific land to be acquired for construction of the casino. The majority relies upon the fact that the word "Property" is capitalized in the definition of "Trust Lands," but ignores the context and use of the term "Trust Lands" within the contracts themselves.

It is well settled that a contract should be interpreted so as to give meaning to each of its provisions. "Since an agreement is interpreted as a whole, it is assumed in the first instance that no part of it is superfluous." *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 278-79 (9th Cir. 1992) (quoting Restatement (Second) of Contracts § 203(a) cmt. b (1979)). The majority's reading of the Lease renders the defined term "Trust Lands" meaningless. The defined term "Property" includes "real property upon which the Structure will be constructed by Developer, which at the time of construction will be titled to the United States in trust for the benefit of the Tribe." This term already requires that the land acquired for the casino be held in trust by the United States for the Tribe. The defined term "Trust Lands" includes "Property held by the United States in Trust for the benefit of the Tribe." If this definition only refers to "Property" as defined by the Master Definitions List, the two terms mean exactly the same thing. Thus, the term "Trust Lands" would be superfluous because it would not include any land not already covered by the definition of "Property."

Additionally, contracts should be interpreted to be "internally consistent." *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 872 (9th Cir. 1979) (applying California law). When the contract is unambiguous, the express language is to govern.

Oracle Corp. v. Falotti, 319 F.3d 1106, 1112 (9th Cir. 2003) (citing California law).

The majority reads only the Master Definitions List to determine what the term "Trust Lands" means, and ignores the plain language of the whole Lease, thereby making it "internally inconsistent." First, the majority overlooks the fact that the first letter of every definition in the Master Definitions List is capitalized. Thus, the fact that "Property" is capitalized in the definition of "Trust Lands" has no significance. Neither the Lease nor the parties' other contract has language indicating that the word "Property," the first word of the definition of "Trust Lands," refers only to the term as defined previously in the contracts. At best, the majority's reading of this language suggests an ambiguity in the contracts. An ambiguous contract cannot be interpreted without determining the intent of the parties. If this is the case, the matter should be remanded to the district court for such a determination.

Second, the majority ignores the remainder of the Lease, which makes clear that the term "Trust Lands" is not limited to property to be acquired in the future, and thus triggers the application of § 81. For example, section 14.1 of the Lease provides that the Tribe represents and warrants:

> F. There are no judgments filed or suits, actions, or proceedings pending, or to the knowledge of Lessee, threatened against or affecting the Lessee or the Trust Lands or by any court, arbitrator, administrative agency, or other Governmental Authority which, if adversely determined, would materially and adversely affect the construction, development, or operation of

> the facility as contemplated in the Transaction Documents.

It would be internally inconsistent to apply the majority's definition of "Trust Lands" to this provision. If the words "Trust Lands" refer only to yet to be acquired property on which the casino will be built, this paragraph is superfluous. The Tribe could not realistically make any of the required representations or warranties on land it had not yet acquired. Thus, at the time the Tribe and NGV entered into their contracts, section 14.1 of the Lease would have been meaningless.

Applying basic rules of statutory interpretation, the Lease clearly contemplates that the definition of "Trust Lands" includes *any* trust land of the Tribe, not just the property to be acquired for the Tribe by NGV in the future. Thus, the parties' contracts were undisputedly subject to approval by the Secretary of the Interior under § 81.

III.

The Tribe also brought a declaratory judgment action to determine the validity of its contracts with NGV. The district court found that (1) it had subject matter jurisdiction over the declaratory relief action; (2) § 81 applied to the to-be-acquired trust lands; and (3) because the Secretary of the Interior did not approve the contracts as required under § 81, the contracts were invalid. NGV appealed that decision.

As noted in the majority opinion, the Tribe entered into contracts with Harrah's after entering into the contracts with NGV. In the Harrah's/Tribe contracts, the Tribe specifically indemnified Harrah's against any lawsuit by NGV. While the appeal was pending, the Tribe and Harrah's terminated their contracts

and entered into a settlement agreement, wherein the Tribe agreed to continue to indemnify Harrah's against claims made by NGV. Based upon the termination and settlement, NGV on appeal asserts an additional argument, alleging that the declaratory judgment is moot (no case or controversy exists) because of the termination of the contracts. The majority agrees, because (1) the contracts between the Tribe and Harrah's were terminated; and (2) the underlying contracts between the Tribe and Harrah's were invalid because they were never approved. Although the Tribe entered into a settlement agreement, which required the Tribe to continue to indemnify Harrah's, the majority found that the settlement agreement was void for lack of consideration. I again disagree with the majority.

The parities dispute whether the Tribe's obligation to indemnify Harrah's survived the termination of the contracts, and therefore whether a case and controversy existed or continues to exist. Both the Management Agreement and the Development Agreement between Harrah's and the Tribe contained an indemnification clause. The clause states:

> *Indemnity*. To the fullest extent permitted by law, the Tribe shall indemnify Developer and its Affiliates against any claims relating to the development, management, or operation of the Casino of the Tribe by any person, . . . with which or whom the Tribe has had any business relationship, association, or dealing prior to the date hereof. This indemnification shall survive the termination of this Agreement for a period of three (3) years.

In addition, both of the contracts contained a severability clause stating in part:

> *Severability*. If any of the material terms and provisions hereof shall be held invalid or unenforceable, such invalidity or unenforceability shall not affect any of the other terms or provisions hereof.

Based upon the language in foregoing clauses in the contracts, there is a question of fact as to whether the termination of the contracts ended the Tribe's obligations to indemnify Harrah's. Even if the language in the contracts is not applicable, California law provides that:

> the compromise of a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though it may ultimately be found that the claimant could not have prevailed. This is true whether the claim be in suit or not . . .

Union Collection Co. v. Buckman, 88 P. 708, 710 (Cal. 1907).

California law further provides that partially illegal contracts may be upheld if the illegal portion is severable from the part which is legal. *Mailand v. Burckle*, 572 P.2d 1142, 1152 (Cal. 1978) (severing a contract void under the Cartwright Act). The issue of "whether a contract is entire or whether its various stipulations are to be regarded as severable is a question of construction." *Sterling v. Gregory*, 85 P. 305, 306 (Cal. 1906). Thus, to determine whether provisions of otherwise illegal contracts have continued vitality, a court must examine "the language and subject-matter of the contract . . . according to the intention of the parties." *Pac. Wharf & Storage*

Co. v. Standard Am. Dredging Co., 192 P. 847, 849 (Cal. 1920). In determining the parties' intent, the court must consider "all the circumstances surrounding the making of the contract." *Sterling*, 85 P. at 306.

Because issues of fact have been raised with regard to the effect of the settlement and the validity of the Tribe/Harrah's contracts, "we must remand to the district court to conduct, as necessary, further evidentiary proceedings to resolve those issues." *Bank of New York v. Fremont Gen. Corp.*, 523 F.3d 902, 910 (9th Cir. 2008).

APPENDIX D

CASINO POLITICS

Page One Photo: Park Place Entertainment CEO Arthur Goldberg with Bill Clinton at a Las Vegas fund-raiser in October 1999.

Casino case raises issues of money, politics

Contributions coincide with favorable decisions
(*By Sean P. Murphy, Globe Staff*)

MONTICELLO, N.Y.—Arthur Goldberg, owner of Caesars, Bally's, and other casinos in Atlantic City, knew a threat when he saw one: When an Indian tribe, the St. Regis Mohawks, announced plans last year to build a casino in Monticello—an hour closer to New York City than his casinos—Goldberg knew his business would suffer.

But Goldberg, a fund-raiser for the Democratic Party, had friends in high places. Pretty soon he was arranging meetings with President Bill Clinton and Vice President Al Gore. Then came a cascade of "soft money" contributions to the Democrats. Over a five-month period following the April 2000 announcement of the Mohawk casino deal, Clinton's Bureau of Indian Affairs made several unusual decisions helpful to Goldberg. First, the bureau withdrew the federal government's longstanding support for the group of Mohawks who planned the casino in Monticello; instead, the bureau backed a group of tribal leaders allied with Goldberg; and finally, the bureau intervened to help prevent the enforcement of a Mohawk tribal court's $1.8 billion judgment against Goldberg for interfering in tribal affairs.

On the very day—Oct. 6, 2000—that the Bureau of Indian Affairs issued a letter declaring that the tribal

court had no authority, Goldberg's company contributed $10,000 to the Democratic National Committee. It was the second time a Goldberg contribution was registered on the day of a decision favorable to him.

Now, 12 months after Goldberg's death and nine months after the end of the Clinton administration, the original Mohawk leaders are challenging the Bureau of Indian Affairs' actions in court. The outcome could determine the flow of potentially billions of dollars in gaming revenues. In the fast-growing world of Indian gaming, with annual receipts now over $12 billion, decisions made by political appointees in the Bureau of Indian Affairs can clear the way for tribes to build casinos, or block them entirely.

In the Clinton administration, the Bureau of Indian Affairs was headed by Kevin Gover and his top deputy, Michael J. Anderson, both former Clinton-Gore fund-raisers. Their decisions spurning the recommendations of staff genealogists to approve tribes for gaming have come under sharp scrutiny by Congress and the Bush administration. But no case has raised the issue of money and politics in Indian gaming more directly than that of the St. Regis Mohawks.

"Arthur Goldberg reached right into the government to protect his Atlantic City casinos by controlling gaming in New York state," said Robert Berman, a businessman who headed the group planning the Mohawk casino at the Monticello Raceway. "It's obvious that if you put a casino up here, Atlantic City has problems." Declared Berman, "Goldberg bought access to the top political decision-makers and got the results he wanted."

But representatives of Park Place Entertainment, the casino company that Goldberg once headed, strongly object. They say the Bureau of Indian Affairs withdrew its support for the group of Mohawk leaders allied with Berman because of a lack of popular support for that tribal government. Any suggestion the BIA switched sides "as a result of political contributions is utterly without factual foundation and is absurd," a lawyer for Park Place said. Gover, the former BIA head, also insists his decision was not politically influenced.

The Mohawk have been recognized by the United States as a sovereign nation for over 200 years on their vast Akwesasne Reservation, which stretches from the northern Adirondack Mountains in New York into Quebec. In the late 1980s, dire economic conditions on Indian reservations prompted Congress and the Supreme Court to give their blessings to Indian casinos. By the mid '90s, New York state officials, who watched with frustration as New Yorkers crossed state lines to spend ever-increasing sums in Atlantic City and at the new Indian gaming palaces in Connecticut, recommended that tribes be invited to open casinos in the most economically distressed areas of New York, such as the Catskills, where once-magnificent resorts are now shuttered. The state could share as much as 25 percent of the gross, as Connecticut does from its Indian casinos.

An opportunity for investors

Non-Indian investors such as Berman jumped at the chance to recruit a tribe into the Catskills. Tribes such as the Oneida, Cayuga, and Seneca were courted by investors like royalty. Berman signed an agreement with the Mohawks, purchased the race-track in Monticello, and set about wending his way

through years of environmental reviews. But not without catching the eye of casino magnates Donald Trump and Goldberg, each of whom controlled about one-third of the $4 billion Atlantic City market. Goldberg's friend, Senator Robert Torricelli, Democrat of New Jersey, came out publicly against Berman's deal. Trump last year paid a $250,000 fine to the New York Lobbying Commission for failing to publicly disclose his role in trying to undercut public support for the Catskills deal by giving a negative portrayal of the Mohawks in advertisements.

On the Mohawk reservation, meanwhile, the Bureau of Indian Affairs worked to adopt a written constitution and an independent judiciary. Elected by a slim majority and recognized by the bureau, the new constitutional government faced an immediate challenge from the previous government, in which power was concentrated in the hands of three chiefs. The chiefs charged that a 51 percent majority was needed for passage of the constitution. Only 50.9 percent voted for it. The Bureau of Indian Affairs stood firm with the constitutional government through several years of appeals, but eventually, in 1999, a federal judge ruled that 50.9 percent did not equal 51 percent, even in a practical sense, and cited the three chiefs' growing popular support.

The bureau began the process of appeal, and, in internal documents authored by federal prosecutors acting on behalf of the bureau, the judge's decision was called "erroneous."

By then, Berman was within months of approval to convert the racetrack into a casino. Berman had agreed in writing to work with whichever tribal leaders prevailed in the legal wrangling.

Shift comes suddenly

But then something unexpected happened. A week after the Berman group received final Bureau of Indian Affairs approval for the casino, the three chiefs' government, in power pending the appeal, abandoned Berman and signed with Goldberg's company, which promised a bigger casino on a different site, once he had received the necessary state and federal approvals. Stunned, the tribe's constitutional government vowed to fight.

Gover, then the head of the Bureau of Indian Affairs, acknowledged last week that he felt pressure "by both sides" for and against the appeal—which now would determine whether Berman's or Goldberg's faction controlled the tribe. Gover said it was a close decision, but he decided the three chiefs had gained more popular support. "We made the decision on the merits," he said. "There was nothing nefarious about it." Gover, a lawyer/lobbyist who was appointed to the Bureau of Indian Affairs' top job after years of fundraising for Clinton, is now representing gaming tribes for a Washington law firm. While in office, he said, he made it a point not to know who was making political contributions. Asked about Arthur Goldberg, he said he didn't know who he was.

But Berman and the Mohawks' constitutional government find that response isn't credible. Documents indicate that while Gover was weighing his decision on the appeal, Goldberg was reaching out to his many political contacts. In June 2000, Torricelli and Jon Corzine, then running for Senate in New Jersey and a recipient of campaign contributions from Goldberg, arranged meetings for Goldberg with Clinton and Gore, according to written phone logs kept by Gold-

berg's secretary and subpoenaed by the New York Lobbying Commission.

A series of donations

On June 28, 2000, for example, Corzine left a message with Goldberg's secretary saying that he "does not mean to be pushy but he has to know before the meeting with the president if he can count on you for $16,000." In fact, Goldberg contributed $16,000 to the Democratic Senatorial Campaign Committee on Aug. 30, 2000, the day a court official accepted the Bureau of Indian Affairs' request to drop the appeal. The records of donations are listed by the Center for Responsive Politics, a nonpartisan Washington-based group that posts on its Web site political donations disclosed in Federal Election Commission records. A Corzine spokesman said Corzine never discussed any casino business with Goldberg.

Earlier in the summer, a Goldberg company affiliate, the Hilton Flamingo, had given the Democratic Congressional Campaign Committee $25,000, and Hilton Hotels, from which Park Place originated and remains affiliated, contributed $10,000 each to the Democratic senatorial and congressional committees.

Meanwhile, Goldberg's company was trying to fight off a huge court judgment against it. A group of tribe members sued the company in Mohawk tribal court—a court set up with the help of the Bureau of Indian Affairs—saying the company had interfered with tribal business. The court agreed, setting a whopping damage figure of $1.8 billion in lost casino revenues. The three chiefs, with Park Place's encouragement, passed a resolution repealing the tribal court, according to documents. Still, a federal court judge

refused to accept the repeal and ruled in favor of the judgment.

On Sept. 22, 2000, the three chiefs met with Anderson, Gover's deputy, and asked for a letter stating that the tribal court had no authority in the eyes of the federal government. Three days later, the wife of Goldberg's general counsel, Clive Cummis, contributed $5,000 to the Democratic Naional Committee; on Sept. 26, the three chiefs' lawyer, Bradley Waterman, contributed $500 to the DNC; and one day later, Cummis and his law firm each contributed $5,000 to the Democratic National Committee, and Hilton Hotels contributed $2,000 to the Democratic Congressional Campaign Committee.

On Oct. 6, Anderson sent his letter saying the tribal court had no authority, and Goldberg's company contributed $10,000 to the Democratic National Committee. Anderson's letter was immediately used by Goldberg's lawyers fighting to get the $1.8 billion judgment against the company dismissed. The case is now pending before a federal appeals court.

Anderson has gone on to a job as a Washington-based lawyer/lobbyist, and in fact has worked closely with the three chiefs since leaving office. Anderson did not return phone calls. Representatives of Clinton, Gore, and Torricelli did not respond to questions. But in Monticello, where a casino was supposed to open in spring 2002, there is suspicion.

Goldberg's plan for a casino in the Catskills still lacks the necessary approvals. Unemployment is high. Times are hard. Many contend that Goldberg never intended to build a casino, so long as he could stop the one planned by Berman, thus assuring Atlantic City's rule over the New York gambling market.

"People wanted the casino for the jobs," said Valerie Caruso of Monticello. "We're an impoverished community. But somehow it got taken away, and I know politics had something to do with it, somehow."

Waterman, the lawyer for the three chiefs, said there was no connection between the soft money contributions by Park Place and its associates and a desire to affect Bureau of Indian Affairs policy. "I've never heard any suggestion of an attempt to influence the bureau," he said. Asked about his own $500 contribution, Waterman said he did so because he supported Al Gore for president.

This story ran on page A1 of the Boston Globe on 10/30/2001.

APPENDIX E

April 22, 2000

Mohawks Sign New Casino Deal, Leaving Catskill Plan in Limbo

By CHARLES V. BAGLI

The leaders of the St. Regis Mohawk tribe, who were awaiting final approval to build a $500 million casino in the Catskills, have turned their backs on their original plan and instead have signed a highly unusual agreement with the largest gambling company in the world.

The deal would turn over exclusive rights to build, develop and manage any Mohawk casinos in New York State to the company, Park Place Entertainment, according to copies of the agreement given to The New York Times by people who deal with the tribe. Park Place is the owner of three casinos in Atlantic City. The rights to the Mohawk casinos could be worth billions of dollars, investment analysts who follow the gambling industry said.

In return, the impoverished Mohawks would receive a $3 million loan and a large percentage of the profits from any casino. Some industry analysts doubt that Park Place will ever build a Mohawk gambling hall because it would undercut the company's heavy investment in Atlantic City. Park Place's intentions are among the unanswered questions surrounding the deal, though the company says in the agreement that it will begin building a "gaming facility" within 36 months. It is unclear whether the Park Place agreement will stand up to federal scrutiny or a challenge by the tribe's original casino partners.

What is clear is that the agreement—negotiated by Arthur M. Goldberg, the chief executive of Park Place Entertainment, with the help of former United States Senator Alfonse M. D'Amato—will almost certainly delay the coming of any casino to the Catskills for years.

Originally, the Catskill Development Group had planned to donate 30 acres to the tribe for a casino in Monticello, N.Y., in return for a share of the revenue.

The Catskill group learned only Thursday night about the agreement, which was signed by six tribal chiefs and Mr. Goldberg on April 14. Robert Berman, a partner in the Catskill group, said the tribe was misled.

"This is the greatest rip-off of an Indian tribe since the Dutch grabbed Manhattan for $24," Mr. Berman said. "The tribe is selling out its future for a $3 million loan. But I still believe there's an opportunity for the tribe to salvage this."

Mr. Berman said he believed the tribe could renounce the Park Place deal on technical grounds.

Donald J. Trump and other Atlantic City casino operators—but not Mr. Goldberg—have spent millions lobbying in Albany against the Monticello casino, which they believe would cut into their profits by attracting gamblers from New York City and northern New Jersey. Analysts have said the Monticello casino would generate more than half a billion dollars a year in revenue.

Neither Mr. Goldberg nor the company's general counsel, Clive Cummis, returned telephone calls yesterday requesting comment. Both men were at the

Mohawks' Akwesasne Reservation yesterday on the Canadian border in Hogansburg, N.Y.

Gus McDonald, the tribe's executive director, and the six chiefs who signed the agreement also did not return telephone calls.

The tribal clerk, Carol Herne, and a former Mohawk chief, Barbara Lazore, both said they were appalled by the deal with Park Place. The two women said they confronted Mr. Goldberg yesterday at a restaurant on the reservation, where he was meeting with the tribal leaders.

"We can't allow this project to go down the drain," Ms. Lazore said. "I don't believe they're here to help the Monticello project. It'd be the No. 1 competition to Atlantic City."

Casino gambling is unconstitutional in New York, but sovereign Indian lands are an exception. Only 16 days ago, the federal Interior Department approved a four-year-old proposal in which Mr. Berman's group would get around the constitutional problem by giving the federal government 30 acres next to the Monticello Raceway in trust for the Mohawks. The Monticello casino plan is now awaiting approval by Gov. George E. Pataki and, possibly, the Legislature.

But even as Mr. Berman's application was approved in Washington, Mohawk tribal leaders were being wooed in secret by Mr. Goldberg and his adviser, Mr. D'Amato, according to tribal executives, rival casino operators and Catskill Development.

"This seems to add a whole new dimension to an already complex situation," said Michael McKeon, a spokesman for Governor Pataki. "We'll need to review the document closely. It appears to have some significant implications."

Mr. D'Amato, a longtime adviser to Mr. Goldberg, is also close to the governor. The former senator did not return calls, but Wayne Berman, Mr. D'Amato's partner, said their consulting company ceased representing Park Place on April 14, the day the agreement was signed with the Mohawks. Wayne Berman, who is no relation to Robert Berman, declined to discuss Mr. D'Amato's work on behalf of Park Place. An official in the Pataki administration said that Mr. D'Amato had stepped down as Park Place's consultant to prevent his friendship with the governor from putting Mr. Pataki in an awkward position.

The Park Place deal with the Mohawks is unusual, the investment analysts said, because Indian tribes routinely grant casino development rights for specific locations. They said no tribe had ever given exclusive rights to as large a territory as New York State.

In return for granting Park Place exclusive development rights, tribal leaders received a $3 million loan from the casino company "for use by the tribe in its discretion." The tribe presumably would use the money to bolster its small money-losing casino in Hogansburg, where the Mohawks recently ousted the existing operator as part of a separate deal with Park Place. The Mohawks would also get 70 percent of the profits from every casino, after Park Place is reimbursed for any advances.

The casino development agreement would not cover the Hogansburg casino or a proposal that just surfaced last year for a Mohawk casino in Greene County.

Jason Ader, an analyst with Bear Stearns, said Mr. Goldberg was playing a shrewd game of chess. On the one hand, he said, Mr. Goldberg could be using

the prospect of a first-class casino in the Catskills to scare off other companies that are considering building new casinos in Atlantic City.

"The question is, does he ever want to get it built?" Mr. Ader said.

There is little question that the Mohawks want new casinos to provide the tribe with money and jobs. Unemployment on the Mohawks' Akwesasne reservation ranges from 35 to 40 percent. But the year-old casino on the reservation in Hogansburg loses about $300,000 a month.

In an interview earlier this month, one tribal executive expressed concern that Alpha Entertainment, a gambling company that is working with Catskill Development, would not gain the approval of the National Indian Gaming Commission, which oversees casino management contracts signed by Indian tribes. Desperate to avoid another Hogansburg catastrophe, the tribal leaders looked to Park Place.

Instead of simply buying out Alpha Entertainment and replacing it, however, Mr. Goldberg sought to take over completely. But one tribal adviser said that Mr. Goldberg had promised to build a casino for the tribe in Sullivan County within four months, which the adviser said was absurd. The Interior Department approved a specific proposal at the Monticello Raceway. Any new proposal would have to undergo an approval process that could take years.

Questioning whether Park Place's promises to the tribe could ever be delivered, one Mohawk adviser said, "The chiefs are so obsessed with the on-reservation casino that they've lost sight of the larger picture."

APPENDIX F

[LOGO] STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

[Filed APR 6 2000]

Honorable George E. Pataki Governor
State of New York
Albany, New York 12224

Dear Governor Pataki:

On October 29, 1999, the St. Regis Mohawk Tribe of New York (Tribe) requested that the Department of the Interior review its application to acquire a 29.31-acre parcel of land located in Monticello, Sullivan County, New York. The Tribe intends to develop a Class III gaming establishment on the property.

Gaming on the Monticello parcel is subject to the two-part Secretarial determination in Section 20(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), 25 § 2719(b)(1)(A), because the land will be acquired in trust after October 17, 1988, is located outside of the Tribe's Indian reservation, and does not come within any of the specific exemptions to the prohibition against post October 17, 1988, gaming on trust lands in 25 U.S.C. § 2719. Pursuant to Section 20(b)(1)(A) of IGRA, before the Monticello parcel can be acquired in trust for gaming, I must determine that a gaining facility on the land would be in the best interest of the Tribe and its members and would not be detrimental to the surrounding community, and you must concur in this two-part Secretarial determination. If you concur in this determination, the land can be acquired by the United States in trust for the

Tribe for gaming purposes, provided all the requirements of the Bureau of Indian Affairs' land acquisition regulations found in 25 CFR Part 151 are complied with.

The Department has completed its review of the Tribe's application. Based on the application and its supporting documentation, including the comments received from State and local government officials, and officials of nearby tribes, the Department has made findings of fact supporting the two-part determination required under Section 20(b)(I)(A) of IGRA.

Based on these findings, I have determined that a gaming establishment on the 29.31acre-parcel of land located on Monticello, New York, would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community. These findings of fact are enclosed along with the supporting documentation for your review. The materials we are providing to you contain information that the Tribe has identified as commercial and financial information, and which they do not want released to an outside party (see enclosed letter from Hans Walker, dated April 5, 2000). We also would not normally release this information as we believe it is protected under Exemption (4) of the Freedom of Information Act. We are releasing it to you as we are required by law to seek your concurrence on our two-part determination pursuant to 25 U.S.C. § 2719(b)(1)(A). We believe, therefore, that this information is necessary for you to make an informed decision regarding this matter. If you receive a request for release of this information, we ask that you contact us before making any determination regarding its release.

Pursuant to Section 20 of IGRA, I seek your concurrence in this determination.

Sincerely,

[Illegible]
Assistant Secretary - Indian Affairs

Enclosures

FINDINGS OF FACT

I. INTRODUCTION

By memorandum dated October 29, 1999, the Director, Eastern Regional Office (ERO), resubmitted to the Assistant Secretary - Indian Affairs (AS-IA), the St. Regis Mohawk Tribe's (Tribe) application for a two-part Secretarial determination that a gaming establishment on a 29.3 1-acre parcel of land to be acquired in trust for the benefit of the Tribe in Monticello, Sullivan County, New York (*OIGM Exhibit 1*), is in the best interest of the Tribe and its members, and not detrimental to the surrounding community, in accordance with Section 20(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(b)(1)(A). The Tribe's original application was transmitted by the ERO to the AS-IA on December 9, 1998 (*ERO Book No. 3, Part II*). The application was returned to the ERO on February 10, 1999 for modification and correction of deficiencies.

The St. Regis Mohawk Tribe is a federally recognized Indian tribe organized under a Three Chief System of government. The St. Regis Mohawk tribal headquarters are located in Northern New York State near Hogansburg, New York approximately 350 miles from Monticello, New York.

II. DESCRIPTION OF THE PROPERTY

The parcel of land is located in the northwest corner of the Village of Monticello, adjacent to the Town of Thompson, in Sullivan County, New York (Monticello Property). It is currently part of the Monticello Raceway, an existing harness racing track. The legal description of the property is contained in *ERO Binder No. 1, Tab B, No. 2.*

III. COMPLIANCE WITH IGRA

The Monticello Property is neither within or contiguous to the Tribe's existing reservation and the application is submitted by the Tribe in accordance with Section 2719(b)(1)(A) of IGRA (*O1GM Exhibit 1*).

The Tribe's Class III tribal gaming ordinance was approved by the National Indian Gaming Commission (NIGC) on January 21, 1994 and an amendment to the ordinance was approved by the NIGH on June 21, 1995,

The Tribal-State Compact for Class III Gaining between the Tribe and the State of New York was approved by the AS-IA on December 4, 1993, and published in the FEDERAL REGISTER on December 13, 1993 (*ERO Binder II, No. 14*). The Compact was amended on January 19, 1995 and published on January 30, 1995 (*ERO Binder II, No. 15*); the Compact was amended again on May 27,1999 and published on August 13, 1999 (*ERO Binder II, No. 16*).

IV. COMPLIANCE WITH 25 CFR PART 151

If the Governor of the State of New York concurs with this two-part Secretarial determination, th. Monticello Property will be taken into trust status pursuant to the requirements of 25 CFR Part 151. All regulatory requirements contained in 25 CFR Part 151 will be complied with before the property is taken into trust. The statutory authority for the Tribe to acquire land in trust is Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. 465. Pursuant to the Act of May 24, 1990, 104 Stat. 207, the IRA, including Section 5, was made applicable to all Indian tribes, 25 U.S.C. 478-1.

The Tribe intends to use the Monticello Property for Class III gaming purposes. The planned gaming facility will consist of a two story gaming and entertainment complex with approximately 160,000 square feet of gaming space, to accommodate approximately 3,000 video lottery terminal games, 200 gaming tables, a 12,000 square foot poker room and a 41,000 square foot bingo room (*ERO Book 1*). In addition, an 860,400 square foot multi-level parking garage is proposed with a parking capacity of 2,500 vehicles and surface parking for 2,300 vehicles.

V. TWO-PART DETERMINATION UNDER SECTION 20 OF IGRA

A. Best Interest of the Tribe and its Members

This "best interest" determination is premised on two fundamental assumptions. First, it has been assumed that the Tribe and the State of New York will enter into a long term (extending through the term of the management contract and the loan agreement) amendment to the existing Tribal-State Class In gaming compact that will include Class III gaming machines referred to generically as video lottery terminals, and that the Department of the Interior will be able to approve this amendment, including its scope of gaming and revenue sharing provisions (*OIGM Exhibit 8*). Our determination that a gaming establishment for the Tribe on the Monticello Property is in the best interest of the Tribe and its members should not be construed as an indication that either the scope of gaming or the revenue-sharing provision included in the Business Plan (25 percent of Net Win for Video Lottery Terminals) would be approved if it is included as part of an amendment to the Tribal/State Compact. Determinations on these issues will be made separately when

the proposed amendment is submitted for approval under IGRA. Second, it has been assumed that the NIGC will approve the management contract between the Tribe and Mohawk Management, L.L.C.

1. Market Analysis.

The Tribe is located on a reservation near Hogansburg, New York in an isolated, rural section of Northern New York State, on the American side of the United States/Canada border. *Indian Populations and Labor Force Estimates Report of 1997* shows 8,630 enrolled members, and 4,193 living on or near the reservation, The Tribe suffers from serious economic problems as a result of Unemployement and under-employment among its members. The unemployement rate on the Reservation is estimated to be between 35 to 40 percent. The average household income for about 20 percent of tribal members is less than $10,000per year, and about 40 percent of Mohawk households survive in less than $20,000per year. Of the employed adult population, 20 percent are employed in the service industry, 17 percent are in clerical positions, and 14 percent are laborers; only 12 percent of the employed Mohawks work as professionals. The Tribe hopes that a Class III gaming establishment on the Monticello Property will help alleviate these adverse conditions by generating substantial income for the Tribe and provide significant employment opportunities for tribal members.

There must be a viable market for a gaming project to be successful. The proposed St. Regis Mohawk gaming and entertainment complex at the Monticello Raceway has a number of significant characteristics that all but assure its success. It will be the closest gaming facility to the lucrative New York City market, approximately 90 miles away. The casino

will be located off exit 104, on Highway 17, the New York Quickway. The Quickway is currently a major four-lane artery connecting the metropolitan areas of New York City and Northern New Jersey to the upstate communities of Binghamton and Syracuse. Highway 17 has recently been designated for upgrading to interstate status,

New York is currently the largest feeder state to existing casino venues in Atlantic City, Connecticut, Nevada, and Niagara Falls, Canada. Studies conducted by New York State indicate that approximately $3,000,000,000 per year in gaming revenues is derived from New York residents at these locations. In assessing prospective gaming markets throughout the State, the Governor's Task Force on Casino Gambling (Olaf Exhibit 2) estimated that casino visitation in the Catskills area would be in excess of 9,300,000 visits per year with an estimated potential for casino revenues in excess of $500,000 000. First year projections for total revenues at the Mohawk Casino are estimated at over ____.

The demographics for the casino project are also very positive. Within a 100-mile radius of the proposed casino site, it is estimated that in the year 2000, the population over 21 years will be ____ with an average household income of ____. *See* Indian Gaming Market Assessment and Economic Impact Report, March 1996 (*Binder II, Tab I, Illustration No. 20*). The recent experiences of the Mashantucket Pequot Tribe and the Mohegan Tribe are reliable Indicia of the strength of the casino market in the northeast. The 1998 casino revenues for the Pequots and the Mohegans are reported to be $680.1 million and $434.6 million respectively.

The proposed casino is designed to accommodate approximately 3,000 video lottery terminal games (VLT) and 200 gaming tables, a 12,000 square feet poker room, and a 41,000 square feet bingo room. A significant portion of the anticipated revenue stream is from VLT games. Because of the relative newness of the electronic VLT type machines, the Seven-Year Operating Projections assume that the player appeal of VLT games will be similar to that of slot machines. However, the daily revenue per machine is assumed to be lower than the average occurring at the Mohegan Sun and Foxwoods casinos, an assumption that allows for the possibility that player appeal could be somewhat lower than for slot machines (see bar graph attached to Business Plan, Binder II, Tab I, Illustration No, 12). The trend the Toot industry is the more entertaining and sophisticated electronic platform type games that will be offered at the Tribe's casino. From a player's point of view, the VLT game operates like an electronic slot machine.

2. Description of business relationships.

Catskill Development, L.L.C., a New York company, is the current owner of Monticello Raceway. Monticello Raceway Development, L.L.C., an affiliate of Catskill, will oversee the development, financing and construction of the Class III casino on the parcel to be acquired in trust. Alpha Monticello, Inc., will provide technical services to Monticello Raceway Development in connection with designing and equipping the casino. In addition, the Tribe has contracted with Mohawk Management, L.L.C., to be the casino manager. Mohawk Management is a New York limited liability company comprised of Catskill Development and Alpha Monticello. For these services, Mohawk Management will receive a management fee paid

entirely and exclusively out of net revenues from casino operations. The proposed management contract provides for a seven-year term and a management fee of 35 percent of net revenues. The management contract is subject to the approval of the Chairman of the NIGC.

3. Projections of gross and net income for the tribe and for other entities.

The projected tribal revenue share before debt repayment is projected to be $116.4 million in year one. By year sever, the Tribe will have received a little over one billion dollars, The Tribe's share of net revenues is sixty-five percent of the available net revenues. Mohawk Management, L.L.C. will receive thirty-five percent of net revenues pursuant to the proposed Gaming Facility Management Agreement. In addition, the State of New York is projected to receive 25 percent of VLT gross revenues pursuant to an amendment to the tribal/state compact yet to be negotiated, and the local community will receive approximately $5 million per year with annual increases pursuant to agreements with the Tribe and the developer.

In support of financial projections, a Revised Business Plan is provided (*ERO Binder II, Tab I, Illustration No 12*). The average table game win for the 19 largest Las Vegas Strip casinos is about $80 million per year per casino. The St. Regis Mohawk Casino projects annual table game win of $161 million, growing to $234 million. The daily table game win for the Tribe's proposed casino are projected at levels slightly less than the current average daily win experienced at the Strip in Las Vegas and Atlantic City, and considerably less than the Mohegan Sun. The average win per table per day

is estimated to be $2,200 (*see bar graph attached to Business Plan, Binder II, Tab I, Illustration. No. 12*).

By letter dated February 24, 2000 (*OIGM Exhibit 24*), Alpha Monticello, Inc. submitted a Best Case revision to the financial projections included in its June I 1, 1999, Revised Business Plan (*ERO Binder II, Tab I, illustration No. 12*). The updated projections are summarized in the following chart:

St. Regis Mohawk Tribe
Monticello Casino
Best Case Revision - Dollars in Thousands



4. Projections of management and tribal expenses.

For the Best Case projections, estimated payroll costs are to be $93.7 million in year one, or sixteen percent of gross revenues. Marketing expenses are estimated at $94.7 million and other operating expenses are estimated at $18.4 million. This results in a house profit of $348.2 million. From this amount, approximately $5 million will be paid to the local community fund established pursuant to the Cooperation Agreement and approximately $87.6 million would be paid to the State of New York, in accordance with a revenue-sharing formula to be established in an amendment to the Tribal-State Compact. Operating income in Year One would be $255.6 million. From this amount, interest and depreciation are deducted, resulting in net revenues of $179 million to be divided between the Tribe (65%) and the Mohawk Management (35%). Gaming Operating Expenses are projected at about 46 percent of win. Such departmental expenses for large Las Vegas Strip casinos are about 57 percent.

The projected operating expenses appear to be reasonable and accurate. Overall, we fled the Business Plan, the projections and the market assumptions to

be sound. The Manager's share of revenues under the management agreement and the seven-year term of the management agreement, are subject to approval by the Chairman of the NIGC under IGRA.

5. Basis for projections and comparison to other similar gaming establishments.

The Tribe bases its projections on *Indian Gaming Market Assessment & Economic Report*, Urban Systems, Inc., March, 1996 (*ERO Binder II, Tab I, Illustration No. 20*). The proposed casino is expected to be comprised of 213,000 square feet of gaming and will offer 200 table games and 3,000 video lottery terminals arid electronic pull-tab machines.

The *Global Gaming Almanac 1996*, Bear Stearns, estimates the Southern New York market at 3,518,822 gamer visits and $176 million gross revenue. The Tribe projects 6.1 million gamer visits in the first full year of operation. Mohawk Management offers an analysis of why it believes that the Global Gaming Almanac understates the Monticello share of the New York market. It states that the methodology used by Bear Stearns in the Almanac results in only a small portion of the New York City market assigned to Monticello, resulting in the underestimation. It notes that the Mohegan Sun Casino enjoyed 7.5 million actual visits in 1998, a one million increase over the previous year (*OIGM Exhibit 19*).

6. Projected tribal employment.

Projections are that approximately 260 tribal members will be employed directly by the proposed casino, earning an estimated total of $6.6 million annually. In addition, it is estimated that approximately $23 million in contracts will be awarded to tribally-owned

construction enterprises engaged in the construction and renovation work related to the proposed casino project. Because of high unemployment on the reservation, the Tribe anticipates that a substantial number of tribal members will take advantage of the increased employment opportunities in Monticello.

The facility is approximately 350 miles from the St. Regis Mohawk reservation. *Indian Populations and Labor Force Estimates Report of 1997* shows 8,630 enrolled members, and 4,193 living on or near the reservation. Approximately 600 members were unemployed and seeking employment. No estimate has been made of the number of reservation residents or unemployed, who would relocate to the casino. Tribal members leaving for jobs at the proposed casino could reduce reservation unemployment by a substantial percentage.

7. Projected benefits from tourism and basis for the projection.

Tourism on the reservation is unlikely to be impacted because the proposed gaming establishment is located approximately 350 miles from the Mohawk Reservation. Tourism in Sullivan County, New York, is projected to be impacted, and is discussed in another section of this document.

8. Projected training benefits for tribal employees and basis for projection.

Significant training opportunities will be provided to tribal members as a result of the proposed casino, as required by the management agreement. The Tribe anticipates that tribal members will be trained at the Sullivan County Boces Center for Casino technology. Tribal members will receive training in areas such as

casino management, administration, casino hospitality, and dealer training.

Sullivan County Community College and Sullivan County Boces Adult Program propose a "Center for Casino Technology." (*August '96 - Original Application Volume 2, Part 2, Tab 18*) Curricula table games, slot, machines, support, maintenance, transportation, business and financial administration, food service, and computers are proposed. The cost is $5 per classroom hour, and the student will receive a certificate indicating the course passed. The Center will notify the casino that the student passed the course. Graduation from a training program does not guarantee employment.

The training programs in Sullivan County promote career advancement and opportunity, and teach skills to tribal members who relocate to the area of the Casino. Casino business and general skills training will improve tribal members' job skills for increased opportunities on and off-reservation,

9. Projected benefits to the tribal community from increase in tribal income.

Revenues from the casino will enable the Tribe to expand its reservation Senior Citizen Center, as well as to construct a day care facility and ambulatory/ nursing home. Among the planned infrastructure projects are an expansion of the sewage system, an extension of a water line to serve the entire reservation and the connection of a natural gas pipeline to the reservation. The Tribe also plans on providing funds for scholarships and post-secondary education tuition assistance,

10. Projected benefits to relationship between the tribe and the surrounding community.

The proposed casino will benefit the relationship between the Tribe and the surrounding community by revitalizing an economically depressed area. It will provide substantial employment opportunities for local residents, increase tourism and create new non-gaming jobs. The overwhelming majority of the surrounding community supports the proposed casino. The Tribe and the developer participated in over 100 public meetings with the Sullivan County Casino Gaming Advisory Board, county and local officials, business organizations and interested residents. The purpose of those meetings were to address issues related to the casino project and to promote a dialogue between the Tribe and the local community.

Those meetings resulted in the Tribe and the Sullivan County Casino Gaming Advisory Board entering into a Memorandum of Understanding (MOU) pursuant to which the Tribe will execute an agreement binding itself to the Cooperation Agreement. The Tribe will make direct annual payments of $5 million to a Community Development Fund to offset anticipated increased cost of services to the proposed casino property and the removal of the property from the tax rolls.

11. Possible adverse impacts on the tribe.

There are no foreseeable adverse impacts on the Tribe associated with the acquisition of the Monticello property in trust for a gaming and entertainment center.

12. Other Issues.

As part of our review of the documentation submitted with the application, the following agreements be-

tween the Tribe and the St. Regis Mohawk Gaming Authority, and the manager, developer, and current owner of the property to be placed into trust, were reviewed: (1) Amended and Restated Gaming Facility Development and Construction Agreement, dated September 24, 1999; (2) Amended and Restated Shared Facilities Agreement, dated September 24, 1999; (3) Amended and Restated Land Purchase Agreement, dated December 2, 1999 (*OIGM Exhibit 3*), (4) unexecuted Leasehold Mortgage; and (5) unexecuted Declaration of Covenants, Conditions, and Restrictions by Catskill Development, L.L.C.

By letter dated March 10, 2000, the Tribe was notified that several provisions in the agreements raised significant concerns, and that modifications or explanations were necessary before a best interest determination could be made (*OIGM Exhibit 25*). By letter dated March 13, 2000, (*OIGM Exhibit 26*), the Tribe forwarded a Master Amendment to the various agreements executed on March 13, 2000 by the Tribe, the Authority, Catskill Development, Monticello Raceway, and Mohawk Management. By letter dated March 27, 2000 (*OIGM Exhibit 31*), a second Master Amendment, executed on March 22, 2000, was submitted. The Master Amendment dated March 22, 2000, supercedes the Master Amendment dated March 13, 2000. The second Master Amendment, dated March 22, 2000, and the explanations in the March 13 letter, meet the concerns expressed in the March 10 letter.

The Land Purchase Agreement establishes a purchase price of ____. The Monticello Property was appraised at ____ as of July 1, 1999, by Appraisal Group International (*Binder III, Tab K*). The Bureau of Indian Affairs will certify the accuracy of this

appraisal before the land can be taken into trust pursuant to 25 CFR Part 151.

The Declaration of Covenants, Conditions, and Restrictions will need to be amended before the Monticello Property can be taken into trust to satisfy the requirements of 25 CFR 151.13.

Summary on "best interest" determination:

The record indicates that a gaming establishment on the Monticello Property would be in the best interest of the Tribe and its members.

B. Not Detrimental to the Surrounding Community

The proposed gaming project has the -overwhelming support of the local and surrounding communities. The proposed casino will be beneficial to the surrounding community and will have no detrimental effects that have not been mitigated pursuant to the mitigation measures required by the State Final Environmental Impact Statement, the MOU, and the Cooperation Agreement. While Sullivan County was a popular vacation destination in the 1940's and 1950's, tourism in the area has declined significantly since the 1960's. The local communities strongly believe that casino gaming will revitalize the area's tourism industry and increase economic opportunities in the region.

1. Consultation record with appropriate State, local, and tribal officials.

The ERO followed the February 18, 1997, Checklist for Gaming Acquisitions and IGRA Section 20 Determinations for consultation. The ERO consulted with the applicant tribe to secure the data required from the applicant tribe for the "best interest of the Indian tribe and its members" determination.

Appropriate State and local government officials were consulted on the impacts of the gaming operation to the surrounding community as required by Section 20(b)(1)(A) of IGRA. The ERO sent consultation letters in August 1996, listing several suggested areas of discussion for the "not detrimental to the surrounding community" determination.

(a) Consultation with the State of New York.

The ERO sent a consultation letter to New York State Governor George E. Pataki on August 22, 1996 (*ERO Binder I, Tab C, No. 1*). By letter dated September 18, 1996, Governor Pataki declined to take a position on the application (*ERO Binder 1, Tab C, No. 15*).

(b) Consultation with Town of Thompson.

The ERO sent a consultation letter to the Tax Collector, Town of Thompson, on August 12, 1996. On October 11, 1996, the Assessor, Town of Thompson responded by letter dated September 6, 1996, and indicated his support for the Tribe's application because the Town of Thompson and Sullivan County would benefit from the proposed casino due to increase in property values in the surrounding area and greatly increased employment opportunities in the area.

(c) Consultation with Sullivan County.

By letter dated September 18, 1996, ha Cohen, Sullivan County Attorney, responded to the August 22, 1996, consultation letter from the ERO on behalf of himself and other Sullivan County officials who received similar letters, including the Chairman of the Sullivan County Legislature, Raymond N. Pomeroy II, and the Chairman of the Economic

Development, Promotion, and Planning Committee, Robert Kunis (District #8 Legislator), The Sullivan County Attorney indicates that the Sullivan County Board of Supervisors adopted a resolution supporting the concept of an Indian casino operated by the Mohawk Tribe at Monticello Raceway on May 23, 1996. He also states that on June 13, 1996 the three (3) co-Chairmen of the Casino Gaming Advisory Board executed a Memorandum of Understanding with the Mohawk Tribe, dated April 29, 1996 along with an Addendum dated May 23, 1996. He also indicates that the results of a recent survey conducted by the Sullivan County Planning Board has shown that in most of the townships within Sullivan County, a Majority of the people favor casino gaming in Sullivan County, as did a survey conducted by the Middletown Times Herald Record. In the September 18, 1996, letter the County Attorney reserves a final decision on supporting the casino contingent on approval of subsequent agreements between the County, the Village of Monticello, the Tribe, and the Developer, addressing mitigation measures. Subsequently to the letter of September 18, 1996, agreements between the various parties have been entered into, and evidence local government support for the proposed casino.

(d) Consultation with Village of Monticello.

By letter dated September 20, 1996, Mayor James Kenny responded to the consultation letter on behalf of the Village of Monticello, and indicated that the Village Board voted to approve the concept of an Indian casino at Monticello Raceway, and was working closely with the Tribe and the Developer to make this a reality. The Village of Monticello planning board is the lead agency for the State

Environmental Quality Review Act (SERA) mandated by the Environmental Conservation Law of the State of New York, and for the site plan approval. The Cillage of Monticello signed off on a SEQRA findings Statement, and entered into a Cooperation Agreement with Catskills Development. These documents confirm the Village's support for the proposed casino.

(e) Views of other entities.

A letter dated September 13, 1996, was received from James Carpenito, Sullivan County Business Association, the membership of which exceeds 200 businesses from the County. Mr. Carppenito indicates that the Business Association strongly supports the Tribe's proposal and believes that the assessment rolls in the Town of Thompson have been devalued over the years but also believes that the proposed St. Regis Mohawk Casino will result in improvements to the infrastructure of the County, the tax rolls will increase and the tax base will become more equitable for all taxpayers (*ERO Binder I, Tab C, No. 2*).

In a letter to the ERO dated September 18, 1996, Cory Rapkin, President of the Sullivan County Chamber of Commerce, which represents 800 business members, also has expressed his organization's overwhelming support for the Tribe's proposal (*ERO Binder 1, Tab C, No. 2*).

By letters dated October 25, 1996 (*ERO Binder I, Tab D, No. 8*), and February 10, 2000 (OIGM Exhibit 18), the Saratoga County Chamber of Commerce expressed opposition to the Tribe's proposal. Saratoga County borders Sullivan County, but its border is approximately 90 miles from Monticello.

By letter dated September 30, 1996 (*ERO Binder I, Tab D, No, 10*), and an undated letter received by OIGM on November 3, 1999 (*OIGM Exhibit 12*), the Coalition Against Casino Gambling expressed its general opposition to the Tribe's proposal. The record contains numerous other letters expressing either support or opposition to the Tribe's proposal. In our view, notwithstanding the opposition of some groups, the record indicates that the local community strongly supports the Tribe's proposal.

By letter dated October 11, 1999 (*OIGM Exhibit 22*), Messrs. William Webster and Alexis Johnson, on behalf of two New York State Legislators, urged the Department to take no action in furtherance of the Tribe's application until the judicial resolution of *Wright and Seabrook v. Pataki*, filed in New York Supreme Court, New York County. Plaintiffs in this action allege that the 1993 Tribal State compact between the Tribe and the State of New York, and a 1999 Amendment to the Compact are unlawful because the Governor lacks the authority to unilaterally enter into such agreements under the Constitution of the State of New York. A similar letter, dated October 14, 1999 (*OIGM Exhibit 11*), was received from Mr. Cornelius Murray, on behalf of the Saratoga Chamber of Commerce which filed a similar lawsuit against the Governor, *Saratoga Chamber of Commerce v. Pataki*, On March 8, 2000, the New York Supreme Court dismissed the two lawsuits for failure to join an indispensable party, although appeals of this dismissal are probable (*OIGM Exhibit 32*). However, we do not believe that it is necessary to delay our two-part Secretarial determination under Section 20 (b)(1)(A) of IGRA pending ultimate resolution of these two lawsuits. As stated above, our determination is conditioned on the

successful negotiation of an amendment to the Tribal State State Compact, and can therefore be made as this time. If and when we receive your concurrence with our two-part determination, we will make a separate evaluation regarding whether the Monticello Property should be taken in to trust if these lawsuits are still pending.

(f) Consultation with nearby tribes.

The State of New York has seven (7) Federally-recognized tribes including the applicant Tribe. No tribe has a reservation within 50 miles of the proposed land acquisition, and no consultation was conducted with any of the State of New York's other Indian tribes.

The Delaware Tribe of Western Oklahoma has, by letter dated January 12, 1999, objected to the Tribe's application because of the Delaware Tribe's alleged legitimate historical presence in Sullivan County (*OIGM Exhibit 5*). By letter dated April 26, 1999, the Deputy Commissioner of Indian Affairs advised the Delaware Tribe that the Department did not believe that a historical presence in the area triggers the consultation requirements of Section 20(b)(1)(A) of IGRA, especially since the Delaware Tribe is presently located in a state other than New York State.

2. Environmental documentation and considerations.

The primary documents submitted for compliance with the National Environniental Policy Act (NEPA) for this action are:

1. Final Environmental Assessment, July, 1999 (*ERO Book No. 1*)

2. Update, Monticello Raceway Casino, July 23, 1999 (*ERO Binder I, Tab E, Illustration* No. 6)

3. Finding of No Significant Impact, April 4, 2000 (*OIGM Exhibit 33*)

4. Level I Survey, Contaminant Survey Checklist, August 19, 1998 (*ERO Binder I, Tab F, Illustration No. 1)*

5. Level II Contaminant Survey, October 28, 1999 (*ERO Binder I, Tab G, Illustration No. 1*)

A final Environmental Assessment (EA) was completed in July 1999, in compliance with the requirements of NEPA and Council on Environmental Quality Guidelines for implementing NEPA (40 CFR Parts 1500-1508). The EA supersedes a prior EA, dated April 22, 1998. A Finding of No Significant Impact (FONSI) was issued by the ERO for the superseded EA (*ERO Binder I, Tab E, Illustration No. 1*), but in a February 10, 1999, memorandum, the Deputy Commissioner of Indian Affairs identified a number of environmental issues that needed to be addressed, requiring amendments to the April 22, 1998 EA. The EA was modified, and resubmitted in July 1999. The July 1999 EA responds to comments in the February 10, 1999, memorandum, as well as to changes subsequently proposed in the project plan. A new FONSI was developed and issued on April 4, 2000 (*OIGM Exhibit 33*).

The July 1999 EA utilizes data and analyses included in a Draft and Final Environmental Impact Statement (DEIS FEIS) prepared in February 1997 and February 1998 respectively, under the provisions of the New York State Environmental Quality Review

Act (SEQRA). The Lead Agency for the SEQRA process was the Planning Board of the Village of Monticello which, on March 10, 1998, issued a Findings Statement concluding that the project, as mitigated, had no significant adverse environmental impacts. The SEQRA Findings Statement list 48 findings of fact, impacts, and mitigation measures to be taken to avoid or minimize any and all adverse environmental impacts related to the proposed project. On July 6, 1999, the Village of Monticello Planning Board adopted a resolution amending the SEQRA Findings Statement, and also adopted a SEQRA Resolution stating that it has reviewed the EA and proposed amendments to the site plan, subdivision plat, special use permit and variances, and finding that there will be no significant or substantial changes in the environmental impacts and mitigation requirements described in the March 10, 1998 Findings Statement, that no substantial detriment will be created to nearby properties, that the proposed actions will not produce an undesirable change in the character of the neighborhood, and that the proposed actions will not have an adverse effect or impact on the environment.

As a result of the SEQRA review, a Cooperation Agreement dated December 17, 1997, and amended February 17, 1998, between Catskill Development and the Village of Monticello was executed committing the Tribe and Catskill Development to specific actions and specific mitigation measures of project impacts on the Village of Monticello, Town of Thompson, and Sullivan County. The Cooperation Agreement requires, prior to transfer of the land in trust, the Tribe to enter into a binding written agreement with Catskill Development by which the Tribe undertakes to comply with all of the provisions

of the Cooperation Agreement, including mitigation measures relating to the environment.

The EA states that there are no archaeological sites are reported within one mile of the project area.

No Native American occupation or use sites are reported within one mile of the project area. The area has undergone extensive disturbance associated with construction and operation of the Raceway, so is not considered sensitive to deposit associated with historic occupation or use. No structures were found that are included in the Building-Structure inventory. No sites or structures determined eligible for, or listed on, the National Register are located within or adjacent to the project area.

The U.S. Fish and Wildlife Service and the New York Natural Heritage Program state that there are no records of threatened or endangered species on the site, and no impacts on wild and scenic rivers.

A storage structure will be provided to cover a sand/salt pile. A sump/drainage system with an oil-water separator will be installed to capture run-off from the truck washing pad. A structure will be erected to protect straw bedding and manure prior to disposal. Peat moss bedding storage will be relocated from a site near the wetlands and enclosed in a structure. An exterior maintenance slop sink will be connected to the sewer system, and soils tested, excavated and removed.

A streams and a pond located on the site are "protected" waters under Article 15 of NYS Environmental Conservation Law. Both will be retained with no change and protected during construction.

The project will not result in any violations of the National or State Ambient Air Quality Standards (*ERO, Book 1. page 68*).

The Raceway is bounded by state and county roads, and highly visible from Route 17B (*ERO, Back 1, page 56*). The grandstand is situated 1,000 feet from each of the roads. Its large scale is diminished by both distance and intervening facilities. The parking structure will be within 250 feet of Route 17B. The design of the casino and parking structure will enhance the visual character of the site (*ERO, Book 1, page 83*).

There was no apparent reason to perform a quantitative analysis of noise impacts (*ERO, Book 1, page 42*).

Old transformers assumed to contain PCBs will be replaced. Asbestos containing materials will be encapsulated or removed in accord with applicable Federal and state standards. Analysis of soil samples indicated that prior application of agricultural chemicals has not negatively impacted the site. Five underground tanks were located on the property. Two have already been removed and contaminated soil was excavated and disposed in accord with governmental regulations. One of the remaining three failed a tightness test and was immediately emptied (*ERO, Book 1, page 31*).

The combination of oil, electricity, and propane gas is deemed to be the most efficient means of minimizing energy consumption (*ERO, Book 1, page 83*). Monticello is about 30 miles closer to New York City than the other gaming venues, so motorists may use less auto fuel. The reduction likely will be off-set by an

increase in the total number of gaming visits (*ERO, Book 1, page 84*).

Low flow fixtures will reduce the water consumption at the Casino (*ERO, Book 1, page 84*).

Environmental Justice for Minority and Low-Income Population: The project will not cause any residential displacement, and is not near to any minority or low-income residential area. Increased employment will have a positive impact for minority and low income persons (*ERO, Book 1, page 8.5*).

Contaminant Surveys

A Level I Contamination Survey was completed by the ERO Environmental Coordinator on August 28, 1998. No signs of contaminants were detected (*ERO Binder I, Tab F*). A Level II Contaminant Survey was completed by ERO on October 28, 1999, for the purpose of verifying and documenting the on-site mitigation and remediation measures undertaken by the Tribe. The ERO investigators concluded that the Tribe had fully complied with the NEPA process and that all requirements of Secretarial Order 3127 had been met (*ERO Binder 1, Tab G*).

3. Impacts on the social structure of the community.

Bingo at religious, fraternal and other charitable groups may be impacted. The Cooperation Agreement provides the necessary funding for charitable organizations.

4. Impacts on the infrastructure.

(a) Utilities

Electric and telephone systems will be designed for the site. Natural gas is not available. Fuel oil will be used for heating, propane gas will be used

for cooking. Oil and gas will be stored in on-site tanks (*ERO, Book 1, page 20*).

The solid waste landfill has a capacity of 2,000 tons per week (ERO, Book 1, page 51). The Monticello Project will generate about 400 tons of compacted solid waste per year (*ERO, Book 1, page 75*).

(b) Zoning

The Casino site has General Business or Commercial Industrial zoning on three sides, and Rural Residential zoning on one side (*ERO, Book 1, page 56, Map No. 13*).

(c) Water

Water will be supplied from the Village's existing West Broadway storage tank via a 10" line on Route 17B (*ERO, Book 1, page 20*). The Village has excess capacity of 700,000 gallons per day (gpd). The Casino projected usage is 159,000 gpd (*ERO, Book 1, page 51*).

(d) Sewer and storm drainage

A new sanitary sewer system will replace the existing system on the Raceway site to be owned by the Raceway and will connect to a Town of Thompson owned force main from Its Benmosche pump station. Pages 32, 79, 80 of the EA address the capacity of the Village of Monticello. A new storm water drainage system will be installed on-site with three detention areas (*ERO, Book 1, page 20*). Four additional personnel and several vehicles will be required (*ERO, Book 1, page 74*).

(e) Roads

1. Access

A new main entrance will be controlled by a new traffic signal on Route 178 with three entering and three exiting traffic lanes (*ERO, Book 1, page 20*). The trust lands will have direct access to Route 7B via a dedicated easement over the Raceway lands (*ERO, Book 1, page 18*).

2. Traffic Impact Analysis

A detailed traffic report, "Traffic Analysis Monticello Raceway Casino," is included in the February 1998 SEQRA FEIS. Three unsignalized intersections were predicted to operate at Level of Service (LOS) "F." All three intersections will be upgraded under the Cooperation Agreement and the SEQRA Findings Statement to operate at a satisfactory LOS (*ERO, Book 1, page 39*). Additional maintenance to streets will cost $100,000 annually (*ERO, Book 1, page 75*). Section 6.2 of the EA details the roadway improvements that are committed to by the Cooperation Agreement and the SEQRA Findings Statement. These improvements will result in satisfactory overall operating levels of service at each analyzed intersection.

5. Impact on the land use patterns of the surrounding community.

The added population to Sullivan County will require approximately 1,900 new dwelling units. It is estimated that there are currently approximately 3,500 vacant dwellings. It is projected that about 1,000 of these units would be occupied by the added population, leaving a need for 900 new dwellings (*ERO,*

Book 1, page 73), It is anticipated that the local housing industry will be able to respond to this need because there are many vacant land areas with sewer and water capacity within a 30 minute commute to the proposed casino site.

A Special Permit from the Village of Monticello is required to permit the development of ten executive housing units for key Tribal employees.

Several variances internal to the Casino project are required, but will have no impact on adjacent property (*ERO, Book 1, page 82*).

The land-use patterns in the surrounding area are under the control of local governments. The proposed project is consistent with the land use character of the surrounding area, which includes commercial recreational facilities, restaurants and bars, gasoline stations and auto repair facilities, bungalows and summer cottage colonies, vacant commercially zoned properties and other miscellaneous commercial and industrial uses. It is also within close proximity of the Village of Monticello central business ditrict where a number of properties are vacant or in partial use. The proposed casino is expected to increase the potential for revitalization of that area (*ERO, Book L page 81*).

6. Impact on income and employment in the surrounding community.

Directly and indirectly, the Casino is expected to generate 5,300 jobs in Sullivan County, and $929 million in salaries, products, and services. The Casino will generate 350,000 room nights per year for local hotels and motels, resulting in $21 million in revenue. The impact on income and employment in the community will reverse the recent economic decline in the area. Year-around tourism will increase

employment in virtually all sectors of the local economy.

7. Additional and existing services required or impacts, costs of additional services to be supplied by the community and source of revenue for doing so.

The Sullivan County population increase from the Casino will generate approximately an additional 882 public school children. Since the elementary and middle schools are beyond their rated capacity, the school district will have a capital expenditure need estimated at $1.5 to $4 million, and an annual debt service cost estimated at $150,000 to $400,000. The Cooperation Agreement provides the necessary funding for the school district (*ERO, Book 1, pages 73-74*).

Crime is expected to increase by approximately 13.7 percent, and there will be an estimated additional 1,000 police calls annually. The Village Justice caseload will increase 25 percent. Two additional fire fighters and one fire vehicle will be needed (*ERO, Book 1, page 74*). The Cooperation Agreement provides the necessary funding to mitigate the projected impacts,

The Town of Thompson will have $292,000 in additional costs per year. These will be more than off set by additional property tax and other revenues (*ERO, Book 1, page 76*).

The E. B. Crawford Memorial Library District will have impacts that are hard to quantify. They will be covered by additional property tax revenues (*ERO, Book 1, page 76*).

The payments by the Tribe provide mitigation for all impacts identified in the SEQRA documents. Section

6.3 of the EA details mitigation measures included in the Cooperation Agreement regarding socio-economic, municipal services, and public safety impacts.

8. Proposed programs, if any, for compulsive gamblers and source of funding.

It is anticipated that the State of New York will implement the recommendations of the New York State Task Force on Gambling Report (*OIGM Exhibit 2*) which propose extensive remedies for dealing with problem gambling. The Cooperation Agreement provides for specific measures by the Casino (*ERO, Book 1, page 78*).

Gambling addiction treatment will be expanded by Recovery Center (*ERO Binder 1, Tab D, Item 22*).

Summary on "Not Detrimental" determination:

The record indicates that a gaming establishment on the Monticello property would not be detrimental to the surrounding community.

C. Determination

Based on these findings, it has been determined that a gaining establishment on the Monticello property is in the best interest of the Mohawk Tribe and its members, and is not detrimental to the surrounding community.

Casc/Applicant	Saint Regis Multaok Tribe of New York
Parcel/Tract No.	Title Policy 1/77.11101
County:	Sullivan
State:	New York
Acreage:	29.31 acres, more or less

EXHIBITS No. or Alpha

BINDER NO. 1

Tab A — Authorities for Application

Illustration No. 1 Tribal Resolution 96-23- 7/31/96
Illustration No. 2 Tribal Resolution 96-76- 5/23/96
Illustration No. 3 Tribal Resolution 96.057- 4/12/96
Illustration No. 4 Tribal Constitution of June 1995
Illustration No. 5 Memo from ERO to IGMS - 12/9/98
Illustration No. 6 Memo from Hilda Manuel to ERO - 2/10/99

Tab B — Title Documents

Illustration No. 1 Policy of Titles Insurance No. 2F-13702 - 7/6/99
Illustration No. 2 Daft Warranty Deed & Legal Descriptions
Illustration No. 3 Solicitor's Preliminary Title Opinion - 2/16/96
Illustration No. 4 ERO requests for Solicitor's Preliminary Title Opinion - 6/5/98
Illustration No. 5 Solicitor's Preliminary title Opinion – 10/18/99
Illustration No. 6 ERO request for Solicitor's Preliminary Tide Opinion - 10/18/99
Illustration No. 7 Updated Solicitor Title Opinion - 10/21/99
Illustration No. 8 Old Republic Notification, Department of Justice -9/14,99
Ilustration No. 9 Southern Tier Title Report - 10/22/99
Illustration No. 10 Letter with attachment to Kevin Clover - 2/16/99
Illustration No. 11 Letter from Assessor - 10/11196

Tab C — ERO Notices to State, County & Local Government Agencies

Illustration No. 1 ERO letter - 8/12/96
Illustration No. 2 ERO letter -8/22/96

Tab D Responses to Public Notices - (See Table)

Tab E Environmental Documentation

Illustration No. 1 FONSI - 9/24/98
Illustration No. 2 Updated FONS1 10/28/99
Illustration No. 3 Legal Notice and Affidavit - 10/9/98

Updates Is Environmental

Illustration No. 4 Letter from Hartgen 10/22/99
Illustration No. 5 Letter from Catskill, EA update - 7/26/99
Illustration No. 6 Dames & Moore Letter – 7/23/99
Illustration No. 7 Letter from Parish, Weiner, & Shuster 7/21/99
Illustration No. 8. Parish, Weiner & Shuster responses to 2/10/99 memo – 5/19/99
Illustration No. 9 Seetion 7-Wetlends 4/22/98
Illustration No. 10 Section 106 - Appendix C - 4/22/98

Tab F Level I Contaminant Survey

Illustration No. 1 Level I Survey - 8/28/98

Tab G Level II Contaminant Survey

Illustration No. 1 Level II Survey - 10/28/99
Illustration No. 2 Document for Site Investigation Report- 8/30/99
Illustration No. 3. Chronological Environmental History & Attachment 10/28/99
Illustration No. 4 Gaming Checklist – July 1999
Illustration No. 5 Section 7 - Endangered Species Act - 4/13/99
Illustration No. 6 Archeological Sensitivity Assessment - Feb. 1996

Tab H Environmental Responses regarding the Published FONSI

Illustration No. 1 Sullivan Business letter - 10/12/91
Illustration No. 2 Saratoga County letter - 10/15/98
Illustration No. 3 NYS Community of Churches letter - 10/20/98
Illustration No. 4 The United Methodist Perish letter - 11/11/91

BINDER NO. II

Tab I Supporting Documentation forTrust Appliocation regarding Financial.Title Leasehold, Special, or Cooperative Agreements.Special Assessments.etc.,

Illustration No. 1 Letter from Hans Walker - 9/24/99
Illustration No, 2 Amended & Restated Gaming Facility Management Agreement - 9/24/99
Illustration No 3 Amended & Restated Gaming Facility Development tad Construction Agreement - 9/24/99
Illustration No. 4 Leasehold Mortgage Assignment of Leases & Rents and Security Agreement - 9/24/99
Illustration No. 5 Amended and Restated Shared Facilities Agreement – 9/24/99
Illustration No, 6 Amended & Restated Land Purchase Agreement – 9/24/99
Illustration No. 7 Declaration of Covenants, Conditions and Restrictions – 9/24/99
Illustration No. 8 Memorandum of Understanding - Constitutional Government & the Tribe of Chiefs - 7/31/96
Illustration No. 9 Letter to Paul Thompson - 7/26/96
Illustration No. 10 MOU- St. Regis & Advisory Board - 4/29/96
Illustration No. 11 Addendum to MOU of 4/29/96 - 5/23/96
Illustration No. 12 Revised Business Pian - 6/15/99
Illustration No. 13 Letter from NIGC to Edward Smoke - 8/31/99
Illustration No. 14 Tribal State Compact - 6/2/93
Illustration No, 15 Amendment to the Tribal-State Compact - 1/30/95
Illustration No. 16 Amendment to the Tribal-State Compact - 5/27/99
Illustration No. 17 Cooperation Agreement between Catskill Development L.L.C. & Monticello – 12/17/97
Illustration No, 18 Resolution Amending Attachment "A' to 12/17/97 Cooperation Agreement - 2/17/91
Illustration No. 19 Cooperation Agreement Supplementary Amendment No. 2 - June 1999
Illustration No. 20 Indian Gaming Market Assessment & Economic Impact Report- March 1996

Illustration No. 21 "A Partnership for Progress" (summary) - 5/72/97

Illustration No. 22 Land Lease

BINDER NO. III

Tab J Economic Impact Analysis of the Proposed Oneida Nation Casino to be located in Monticello, NY June 1995

Tab K Appraisal 8/2/99.

TAb L Approved Zoning Resolutions,Monticello, NY - (See Table)

Tab M Maps of Project

Illustration No. 1 General Location Map

Illustration No. 2 Architectural Drawing of Survey Site Plan of the Raceway & Casino approved 7/15/99, Village of Monticello Planning Board - (Record of Survey)

Illustration No. 3 The Legal Description of the entire tract

Illustration No. 4 Access Easement "A"

Illustration No. 5 Access Easement "B"

Illustration No. 6 Access Easement "C"

Illustration No. 7 Access Easement "D"

Illuatration No. 8 Access Easement "E"

Illustration No. 9 Access Easement "F"

Illustration No. 10 Access Easement "G"

Illustration No. 11. Architectual Drawings provided

BOOK NO. 1 Final Environmental Assessment July 1999 & Appendices 4/22/98

BOOK NO. 2 Tribe's Original Application - Part I

BOOK NO. 3 Tribe's Original Application - Part II

SUPPLEMENTAL DOCUMENTATION:

1. New York State Task Force on Casino Gambling, Report to the Governor, 8/30/96
2. St. Regis Mohawk Tribe Application for Trust Acquisition 25 CFR 151 Requirements: Volume 1, Volumes I - part 2

3. St. Regis Mohawk Tribe Application for Trust Acquisition Section 20, 1GRA Requirement: Volume 2, Volume 2- part 2, Volume 2- part 2
4. St Regis Mohawk Tribe Article/Transcript & Letters all showing community support: Volume 1
5. St. Regis Mohawk Tribe Section 20 of ERGA Requirements "Community Support" Volume 2, Volume 3, Volume. 4, Volume 5, Volume 6
6. St, Regis Application for Trust Acquisition Section 20, IGRA Requirements- "Trust Acquisition is Not Detrimental to Surrounding Communities" Volumes 3, Volume 3- part 2, Volume 3 - part 2
7. Final Environmental Assessment Monticello Raceway Casino - May 1999
8. Final Environmental Assessment Monticello Raceway Casino - 4/22/11
9. Appendices - Final Environmental Assessment Monticello Raceway Casino - 4/22/98
10. Final Environmental Impact Statement - February 1996 (3 Books)
11. Draft Environmenul Impact Statement - February 1907
12. Draft Environmental Impact Statement Technical Appendices - February 1997
13. Environment Assessment Phase II - February 1996
14. Environmental Assessment Phase I - June 1995

STATE OF NEW YORK
Executive Chamber
Albany 12224

Gerge E.Pataki
Governor

JamesM.McGuire
Counsel to the Governor

May 1, 2000

Honorable Kevin Gover
Assistant Secretary of the Interior
For Indian Affairs
United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Dear Assistant Secretary Gover:

On April 6, 2000, Governor Pataki received a letter from you stating that the Department of the Interior had completed its review of the St. Regis Mohawk Tribe's application to have a 29.31 acre parcel of land at the Monticello Raceway taken into trust by the federal government for gaming purposes. In summary, your letter stated that after undertaking a thorough study of the voluminous application, and support documentation, you have come to the conclusion that allowing the Tribe to construct a Class III gaming establishment on this particular parcel of property at the Monticello Raceway would (1) be in the best interests of the Tribe and (2) not detrimental to the surrounding community. Your letter seeks Governor Pataki's concurrence with this two-part determination, as is required by section 2719(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), before the land may be taken into trust pursuant to 25 Code of Federal Regulations, Part 151, for gaming purposes.

Subsequent to you letter seeking Governor Pataki's concurrence, it has been widely reported that the Tribe has severed its contractual relationship with Catskill Development, LLC, which owns the 29.31 acre parcel of land at the Monticello Raceway which is the subject of the Mohawk's land-to-trust application. Moreover, it appears that the Tribe has signed an agreement with Park Place Entertainment, giving Park Place Entertainment the exclusive right to develop and manage any St. Regis Mohawk Class III gaming establishment in New York State, with the exception of the Tribe's current on-reservation casino and a future casino which the Tribe has proposed to build in the Town of Catskill, Greene County, New York. Officials with Park Place Entertainment have publicly stated that the Monticello site is too small for a casino, and that the company is looking for property elsewhere in Sullivan County upon which to site a casino. Further complicating the situation, several members of the Tribe have filed suit in the Tribes own tribal court seeking to have the contract with Catskill Development reinstated and seeking sizeable damages from Park Place Entertainment for fraudulent inducement and tortious interference.

In light of the confusion as to the relationships among, and the respective roles of, the parties to this project and the uncertainty as to possible sites, it is obviously not possible to consider taking further action until this situation is clarified.

Sincerely,

/s/ Patrick L.Kehoe
PATRICK L. KEHOE
Senior Assistant Counsel
To The Governor

APPENDIX G

[Logo]

Saint Regis Mohawk Tribe
412 State Route 37
Hogansburg, New York 13655
Tel. 518-358-2272
Fax 518-358-3203

April 14,2000

Mr. Clive Cummis, Esq.
Park Place Entertainment Corporation
26 Main Street
Chatham, New Jersey 07928

Re: Saint Regis Mohawk Tribe Casino
Sullivan County

Dear Mr. Cummis:

This letter is intended to set forth certain understandings reached between the Saint Regis Mohawk Tribal Council of the Saint Regis Mohawk Tribe of New York (the "Tribe") and Park Place Entertainment Corporation ("PPE') with respect to the development and management of any and all Class II and/or Class M casinos in the State of New by the Tribe at any time, excluding the current Akwesasne Mohawk Casino in Hogansburg, New York, Scutti Enterprise in Hogansburg, New York and any potential casino or casinos in the town of Catskill, New York. Pursuant to your request, the Tribe agrees to the following:

1. PPE will be the exclusive Developer of any such Class II and/or Class HI casino in the State of New York (excluding the above mentioned) under a development agreement to be entered into hereafter in good faith by the parties;

2. PPE will also be the Manager of any such Class H and/or Class M casino in the State of New York (excluding the above mentioned) along terms substantially similar to those set forth in the purported Gaming Facility Management Agreement between the Tribe and Mohawk Management, LLC signed July 31, 1996, except that as an essential term of such any agreement PPE will have an initial term of seven (7) years. PPE and the Tribe will have a profit distribution of 70% to the Tribe and 30% to PPE;

3. All of the foregoing is subject to the approval of NIGC.

4. PPE will provide the financing necessary to construct such casino facilities. PPE agrees that construction of a gaming facility will commence within thirty-six (36) months of this agreement unless otherwise extended by written consent of the Tribe. The Tribe's portion of the casino profits shall be utilized to pay back PPE's advances. Such payback shall be completed within the seven (7) year term or less without penalty or any agreed upon extension of such term.

5. The Tribe agrees to enact a Tribal Council Resolution in the form of the resolution attached as Exhibit I hereto. In addition, the Tribe agrees to be bound by the limited waiver of tribal sovereign immunity, attached as Exhibit 2 hereto;

6. In consideration of the foregoing, PPE will pay to the Tribe the sum of $3 million for use by the Tribe in it's discretion. Such payment will

be made as soon as reasonably possible after full execution of this agreement and shall be paid back to PPE only in the event that the Tribe does not or is unable to enter into the development, management and licensing agreements set forth above; and

7. Both parties understand that there exists between the Tribe and Mohawk Management, LLC a purported Gaming Facility Management Agreement signed on July 31, 1996. Both the Tribe and PPE believe such agreement is unenforceable and of no force and effect for, among other reasons (1) it is subject to the approval of the NIGC, which approval has not been granted; and (2) there are serious questions as to whether the signatories on behalf of the Tribe to the agreement had the legal right and/or capacity to enter into such agreement and bind the Tribe. PPE also understands the Tribe's legal position with respect to that unenforceable agreement and agrees that it will indemnify the Tribe against any litigation resulting from the Tribe entering into this Agreement with PPE in substitution with the Tribe's prior understanding with the developers of a proposed casino at the Monticello Race Track

THE SAINT REGIS TRIBAL COUNCIL

/s/Hilda E. Smoke, Hilda E. Smoke, Chief

/s/Alma Ransom, Alma Ransom, Chief

/s/Paul Thompson Paul Thompson, Chief

/s/ Richard Terrance Richard Terrance Sub Chief

/s/ John Bigtree Jr., John Bigtree Jr., Sub Chief

/s/ Harry Benedict Harry Benedict Sub Chief

I ACCEPT THE FOREGOING ON BEHALF OF PARK PLACE ENTERTAINMENT CORPORATION

/s/ Arthur Goldberg
Arthur Goldberg, President/CEO

APPENDIX H

[Logo] UNITED STATES DEPARTMENT OF
THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM OF AGREEMENT BETWEEN THE NATIONAL INDIAN GAMING COMMISSION AND THE DEPARTMENT OF THE INTERIOR

WHEREAS. both parties agree that they are in need, from time to time, for legal advice on whether lands may be Indian lands on which a tribe may conduct gaming and that such advice must be provided in a timely fashion;

NOW, THEREFORE, the National Indian Gaming Commission ("NIGC") and Department of the Interior ("DOI") agree to the terms of this MEMORANDUM OF AGREEMENT ("MOA") as follows:

1. The NIGC agrees that whether a tribe meets one of the exceptions in 25 U.S.C. §2719 (*i.e.* settlement of a land claim, restored lands for a restored tribe, or an initial reservation of a tribe acknowledged through the Part 83 process) is a decision made by the Secretary when he or she decides to take land into trust for gaming.

2. The DOI agrees that deciding whether gaming is being conducted on Indian lands is a basic and essential jurisdictional requirement for the NIGC under the Indian Gaming Regulatory Act ("IGRA").

3. To the extent the Secretary or the Chairman seek legal advice for certain actions requiring action under IGRA dependant upon the deter-

mination of Indian lands, the NIGC Office of General Counsel ("OGC") and the DOI Office of the Solicitor ("Solicitor") agree on the following division of responsibilities:

If the Secretary is considering a fee-to-trust acquisition, then the DOI's Division of Indian Affairs ("DIA") will draft the legal opinion to the Bureau of Indian Affairs ("BIA") whether it must complete a two-part determination as part of the fee-to-trust acquisition;

If a tribe and a state submit a Class III Tribal-State Compact for gaming on existing Indian lands, then the DIA will draft the legal opinion whether the tribe has Indian lands:

If a tribe requests that the NIGC approve a management contract or ordinance for gaming on existing trust lands, then the OGC will draft the legal opinion to the Chairman on whether the tribe has Indian lands; and

The OGC will draft the legal opinion to the Chairman whether existing or proposed tribal gaming operations will be on Indian land when the land is already held in trust by the United States.

4. Regardless of whether the DIA or the OGC are drafting the legal opinion, prior to a draft opinion being released to entities other than the DOI and the NIGC, and before any legal opinion is issued, the parties will make every attempt to reach concurrence on all written opinions that provide legal advice that interprets the definition of Indian lands, the exceptions in 25 U.S.C. §2719, a tribe's jurisdiction

over proposed Indian lands or the boundaries of a tribe's reservation.

5. A request for concurrence of an Indian lands opinion will include a draft of the opinion and copies of all supporting documents. Within 30 working days of receiving the request, the receiving party will notify the requesting party of his or her intent to either concur or not concur.

6. Notwithstanding the 30 working day requirement in paragraph 5, either party may inform the other of exigent circumstances that require an expedited process. Upon agreement of the parties of the need for expedition, either the Solicitor or the OGC will notify the other party within 5 working days of its intent to concur or not concur.

7. If notified of the intent to not concur, then the parties will meet within 15 working days to discuss ways to resolve the issues of non-concurrence. The notice of the intent not to concur shall include in writing all factual and legal reasons for the non-concurrence.

8. If a legal opinion is re-submitted that addresses the issues of non-concurrence, either the Solicitor or the OGC will notify the parties of its intent to concur or not concur within 10 working days.

9. If the parties are still not able to resolve the issues of non-concurrence, the parties will meet to discuss the next step. The next step may include, with the mutual agreement of both parties, submission of the draft opinion and a summary of the issues of non-concurrence to

the Office of Legal Counsel, Department of Justice for resolution.

10. Each party to the MOA will advise the other party within 15 working days of receiving a request to provide Indian lands determinations. The party receiving the request will inform the other party of the individual specifically assigned to work on the legal opinion. In addition, the parties shall periodically coordinate and update pending opinion requests and the OGC shall record and track all Indian lands opinions and decisions in the NIGC Indian lands database and provide periodic updated reports to DIA.

11. If either party has a need for additional information or assistance from the other party in order to render a legal opinion, then the party requiring the information will request such information or assistance in writing to the other party. To the extent either party is able to comply with such a request, it will fully and promptly cooperate with the request. If unable to comply with such request, notice shall be promptly given to the requesting party.

12. The party responsible for the initial draft of the legal opinion shall provide the other party with reasonable time to review the draft and make written comments. The party making the comments will designate the individual responsible and notify the other party. All comments will be provided to the requesting party within 30 working days.

13. The DIA and the OGC will work cooperatively and with collegiality and make every attempt to reach agreement on all Indian lands opinions before submitting a draft legal opinion for concurrence.

14. The Solicitor may request in writing that the OGC draft an Indian lands opinion on pending trust acquisitions that address whether a tribe is a restored tribe and whether the lands are restored lands under IGRA. The OGC, at its discretion, will provide the Solicitor with a draft opinion or decline in writing.

15. It is the position of the Secretary not to approve compacts for gaming on lands that have not been acquired into trust.

16. It is the position of the Chairman not to approve tribal ordinances or management contracts that are site specific when they call for gaming on Indian lands that have not been acquired into trust. The Chairman may continue to approve or disapprove ordinances and management contracts that are otherwise site specific.

17. To meet the demands caused by the need for Indian lands opinions, the NIGC will fund an attorney position (one FTE) within the DIA for 2 years with additional years, if any, in the sole discretion of the NIGC. This attorney position and funding will remain in effect and unaltered by the termination provisions of paragraph 19.

18. This MEMORANDUM OF AGREEMENT supersedes the MEMORANDUM OF UNDERSTANDING previously entered into between

the OGC and the Associate Solicitor of the DOI regarding Indian lands opinions.

19. This MEMORANDUM OF AGREEMENT shall be effective upon signatures by both parties and will terminate six (6) months after the date of execution, unless extended by mutual agreement.

Dated this 26 day of Feb., 2007

For the National Indian Gaming Commission:
Chairman

/s/ Penny J. Coleman
Penny J, Coleman
Acting General Counsel

Dated this 18th day of January, 2007

For the United States Department of the Interior:
Deputy Associate Secretary

/s/ David L. Bernhardt
David L. Bernhardt
Solicitor

APPENDIX I

CQ Congressional Testimony
July 27, 2005 Wednesday

Section: Capital Hill Hearing Testimony

Length: 1272 words

Committee: Senate Indian Affairs

Headline: Off-Reservation Indian Gaming

Testimony-by: Penny J. Coleman

Affiliation: National Indian Gaming Commission

Body: Statement of Penny J. Colemen General Counsel (Acting) National Indian Gaming Commission Committee on Senate Indian Affairs

Chairman McCain, Vice-Chairman Dorgan and members of the Committee: My name is Penny Coleman. I serve as the Acting General Counsel for the National Indian Gaming Commission. Thank you for allowing us to speak with you today. We appreciate the opportunity to testify today about the Commission's involvement in Indian lands questions.

Indian land is the foundation upon which Indian gaming is built. The Indian Gaming Regulatory Act ("IGRA") defines Indian lands; it requires that gaming take place on Indian lands; it limits the National Indian Gaming Commission's regulatory authority to gaming that takes place on Indian Lands; it establishes a prohibition against gaming on trust lands acquired after October 1988; and it exempts many lands from that general prohibition.

Thus, Indian lands are central to many of the Commission's functions. The Commission must determine

whether gaming facilities are located on Indian lands in order to determine whether the IGRA permits gaming on those lands and permits the Commission to regulate it. If a facility is not located on Indian lands, the NIGC has no authority whatsoever over any gaming occurring there or any jurisdiction to stop the activity. The Commission is also required to decide whether a specific parcel is Indian lands when a management contract or a site-specific tribal ordinance has been submitted to the Commission for approval; such determinations are part of our final agency actions on management contracts and tribal ordinances.

The Office of General Counsel also issues advisory opinions on Indian lands. These opinions are often intended to advise tribes whether they should attempt to proceed with gaming on a given site. Sometimes our opinions confirm that a specific parcel is Indian lands. Sometimes they warn a tribe that we do not consider the gaming to be legal.

We share the responsibility for deciding Indian lands questions with the Department of the Interior. The Department makes decisions on lands when a tribe seeks to acquire land into trust, seeks a trust-to-trust transfer for gaming, or seeks approval of a land lease or a tribal-state compact.

For many years, the Department of the Interior assumed the primary responsibility for making Indian lands determinations. However, as gaming expanded in recent years, the Commission's need to make such decisions became more and more pressing. The Commission thus began making these decisions on its own. Because of the shared responsibility with the Department, we entered in a Memorandum of Understanding that requires each agency to notify the other when Indian

lands questions are pending and to provide advice and assistance on the Indian lands determinations.

This is not a small undertaking. Altogether, the Department's Office of the Solicitor and the Office of General Counsel have issued over 50 written opinions and the Commission has made decisions on over 40 management contracts.

Right now, the Commission has approximately 50 Indian lands determinations pending. Some of these will be simple decisions. The land will be held in trust and within the Tribe's reservations boundaries, and no lengthy analysis will be required.

Many Indian lands determinations, however, are complex and difficult. For example, IGRA exempts from the general prohibition of gaming on lands acquired after the date of its enactment when "lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition."

To establish that a tribe's lands fall within the restored land exception, a tribe must establish that it is a tribe restored to Federal recognition and that the parcel on which the gaming is being conducted is restored land.

For a tribe to be restored to federal recognition under the IGRA, it must have been previously recognized; it must have lost its recognized status; and it must be returned to a recognized status. This last can be straightforward, for, in most instances, it will or will not have been included by the Secretary of the Interior on her list of federally-recognized tribes. The first two elements, however, require much delving into our history. Beyond looking to 18th and 19th Century Treaties and laws, the specific political and ethnographic history of the tribe must be reviewed.

Just gathering the relevant information requires a large, cooperative effort among the Tribe, various divisions within the Department of the Interior, and perhaps historians and research archives.

Beyond all of that, determining that lands are restored lands requires the casting of an even broader research net, for not all lands re-acquired by a Tribe are "restored" lands within the meaning of IGRA. Whether lands are restored lands requires a case- by-case determination.

We must look to the factual circumstances of the land acquisition. We must look at the location of the acquisition and consider such questions as whether it is close to the tribe's population base and important to the tribe throughout its history. We must look at the temporal relationship of the acquisition to the tribal restoration (in other words, was this land acquired a year after the tribe was restored to recognition or 30 years later and after the tribe acquired 20 other parcels). All of this requires the Tribe to hire historians and ethnographers and also to produce voluminous historical documents and archaeological evidence, which, of course, can take time to assemble and submit, not to mention time for the NIGC to digest.

A number of our determinations have also resulted in litigation, which slows down our ability to make decisions even further, and to add to the complexity, Congress has the ability to, and occasionally does, legislate the status of lands belonging to individual tribes, and that can change the Indian lands analysis completely.

The Commission and the Department have been criticized by the Department's Office of Inspector

General for failing to decide the Indian lands questions before a facility opens and for failing to have a systematic approach to making such decisions. We share the Inspector General's concern on this. Good government requires that regulators know the extent of their jurisdiction. Furthermore, if we decide that a tribe should not have opened a facility because the lands did not qualify for gaming under the Act, extensive litigation is guaranteed and, if the Commission is correct, the tribe will have incurred millions of dollars in debt with few options for repaying the debt.

We are, therefore, developing a system which is designed to track Indian lands determinations and to identify new problems quickly. Recently, we sent a team to the State of Oklahoma to obtain copies of deeds, maps and other documentation on some of the gaming sites. In California, we also hired a title company to conduct title searches on some sites. This information as well as other information we obtain will be used in establishing the central file system for the Indian lands documentation. We hope to convert this file system into an electronic system in the near future. We are also considering regulations that would require a tribe to establish that a gaming operation is on Indian lands before it licenses the facility.

We thank the Committee Members and staff and stand ready to assist you as you continue to review these Indian lands questions. If you have any questions, I would be happy to answer them.

APPENDIX J

[Logo]
STATE OF NEW YORK

GEORGE E. PATAKI
Governor

June 15, 1999

Dear Supervisor Cellini

Thank you for you recent letter regarding the status of the proposed St. Regis Mohawk casino at the Monticello Raceway. I appreciate all that you have done to keep me up to data on this very important issue. Naturally, it has always been my goal to encourage all economic development strategies that will help ensure that Sullivan County and the City of Monticello enjoy the same economic resurgence that is taking place elsewhere throughout the State. Certainly, one project that shows tremendous potential is the St. Regis Mohawk Tribe's proposal to establish an off-reservation casino at the Monticello Raceway.

As you mention in your letter, the recent agreement between the State and the St. Regis Mohawk Tribe concerning video lottery games at the new on-reservation Akwesasne casino is a very positive development which bodes well for all oldie people of the State of New York and the members of the St. Regis Mohawk Tribe. I believe this historic agreement marks the beginning of a new partnership, forged in the spirit of cooperation, which will smooth the path for other mutually beneficial agreements between our governments in the future.

Also, you are correct in your understanding that the St. Regis Mohawk Tribe's land-to-trust application for land at the Monticello Raceway is still pend-

ing before the Federal Department of the Interior, Bureau of Indian affairs. As you are aware, the Bureau of Indian Affairs' (BIA) Eastern Regional Office recently granted the Mohawk's application Its preliminary approval, only to have it Inter returned by the BIA's Washington, D.C., office for further review upon the submission of additional information. It is also my understanding that the Mohawk Tribe and the management company, Catskill Development, have now provided the additional information that was requested by the BIA. Assuming the BIA's final determination is favorable, I am prepared to attempt to negotiate in good faith an amendment to the St. Regis Mohawk Tribe's gaming compact for an off-reservation casino et the Monticello Raceway in Sullivan County.

Very truly

/s/ George Pataki

The Honorable Anthony P. Cellini
Supervisor
Town of Thompson
4052 Route 42
Monticello, New York 12701-3221

APPENDIX K

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No 01-2267 (DRH)

NATIVE AMERICAN MANAGEMENT CORPORATION, ANDERSON-BLAKE CONSTRUCTION CORPORATION, OHEKA MANAGEMENT CORP. AND GARY ALAN MELIUS,
Plaintiffs,

v.

PARK PLACE ENTERTAINMENT CORPORATION, CLIVE CUMMIS, RICHARD B. NESS AND B. HILLMAN AS EXECUTORS OF THE ESTATE OF ARTHUR GOLDBERG,
Defendants.

DECLARATION OF HON. ALFONSE D'AMATO

1. On or about October 25, 1999, I attended a lunch meeting with Gary Melius ("Menus") and Arthur Goldberg ("Goldberg"). Goldberg represented to Melius that he was President of Park Place Entertainment Corporation ("Park Place") and was there as a representative of and was acting on behalf of Park Place.

2. The meeting was arranged because Park Place wanted to start dealing with the St. Regis Mohawk Tribe (the "Tribe") and President R.C.-St. Regis Management Company ("President") regarding a casino in Hogansburg, New York that was owned by the Tribe and managed by President.

3. I was not personally familiar with the Tribe or with tribal politics and I did not have a

relationship with the Tribe. However, I did have a business relationship with Melius and, knew that he had established a favorable relationship with the Tribe and President being that one of his companies constructed the Casino and another one of his entities had a prior ownership interest in President as a result of monetary investments that were made. I had a business relationship with Goldberg and Park Place and it was at my suggestion that Goldberg begin discussions with Melius and meet with him for the purpose of assisting and advising Park Place regarding its future business ventures with President and the Tribe.

4. At this meeting, Goldberg agreed that Park Place would compensate Melius with a fee of $5,000,000 with respect to services to be rendered in connection with the acquisition by Park Place of President's existing management contract governing the operation of the Casino. It was further agreed by Goldberg that Park Place would compensate Melius with an additional $10,000,000 if and when Park Place secured an agreement with the Tribe regarding gaming operations in the Catskills/Monticello area.

5. In exchange for the above-stated fee to be paid by Park Place, Melius was to be involved in negotiations regarding the acquisition of President's management contract by Park Place, was to advise President and the Tribe to do business with Park Place, was to advise the Tribe to enter into an arrangement with Park Place regarding any future casinos in the

Catskills/Monticello area, was to provide advise to Park Place on how to structure a deal with President and with the Tribe, was to be involved in tribal politics on behalf of and for the benefit of Park Place and was to provide advise to Park Place regarding its future relationship with the Tribe and President.

6. I had subsequent meetings and dealings with both Goldberg and Melius and it was repeatedly stated and it was expressly understood that these services were being provided by Melius in exchange for the fee agreed upon by Goldberg and Melius.

7. All throughout the course of Melius' performance of these various services, Goldberg assured me that Melius would be paid his fee in accordance with the parties' agreement.

8. I certainly have no objection to being deposed hi this matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13' day of August, 2000
Garden City New York

/s/_____

HON.ALFONSE D'AMATO

APPENDIX L

AMENDED AND RESTATED GAMING FACILITY DEVELOPMENT and CONSTRUCTION AGREEMENT

among

ST. REGIS MOHAWK TRIBE, ST. REGIS MOHAWK GAMING AUTHORITY and MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C.

Dated as of July 31, 1996

"Effective Date" shall mean the date on which written approval of this Agreement is granted by the Secretary of the Interior. The parties hereto agree to cooperate and to use their commercially reasonable efforts to satisfy the above condition at the earliest possible date.

APPENDIX M

AMENDED AND RESTATED GAMING FACILITY MANAGEMENT AGREEMENT

by and among

THE ST. REGIS MOHAWK TRIBE, ST. REGIS MOHAWK GAMING AUTHORITY, AND MOHAWK MANAGEMENT, LLC

Dated: as of July 31, 1996

"Effective Date" shall mean the date on which the Chairman of the NIGC grants written approval of this Agreement. The parties agree to cooperate and to use their commercially reasonable efforts to satisfy the above condition at the earliest possible date.

APPENDIX N

NATIONAL INDIAN GAMING COMMISSION

April 19, 2000

Tribal Chiefs
St. Regis Mohawk Tribe
Community Building
Route 37, Box 8A
Hogansburg, NY 13655
Fax (518) 358-3203

Management Board
St Regis Mohawk Gaming Authority
Community Building
Route 37, Box 8A
Hogansburg, NY 13655
Fax (518) 358-3203

Morad Tahbaz
Mohawk Management, LLC
Monticello Raceway
Route 17 B
P.O. Box 5013 Moncello, NY 12701
Fax (914) 791-1402

Thomas Aro, President
Alpha Hospitalty Corporation
12 East 49 Street
New York, NY 10017
Fax (212) 750-3503

Dear Tribal Chiefs, Management Board Members, and Messrs. Tahbaz and Aro:

On December 14, 1999, the National Indian Gaming Commission (NIGC) received the Amended and Restated Gaming Facility Management Agreement (Contract), dated July 31, 1996 but signed November 24, 1999, by and among the St. Regis Mohawk Tribe

(Tribe), Sti Regis Gaming Authority (Gaming Authority), and Mohawk Management, LLC (Manager). In addition, we also received the Amended and Restated Gaming Facility Development and Construction Agreement (DCA), dated July 31, 1996 but signed by the Tribe and Gaming Authority November 24, 1999 and by Monticello Raceway Development Company, LLC (Developer) on December 8, 1999.

We have determined that the Contract and DCA cannot be approved at this time because they do not comply with certain provisions of 25 C.F.R. Parts 531 and 533, as detailed on the enclosure. In order for the Chairman to approve the Contract and DCA, the parties must submit a revised and restated contract that addresses all of the issues on the enclosure.

To assist with the revisions, we recommend that the parties call to schedule a meeting with the NIGC staff to discuss the proposed changes before finalizing the documents. Further, we suggest that the parties submit a revised Contract and DCA within 60 days. If we do not receive a revised Contract and DCA within that time frame, we may recommend that the Chairman disapprove the Contract and DCA.

To schedule a meeting, please call either Elaine Trimble or me at (202) 632-7003.

Sincerely,

/s/ Fred W.Stuckwisch
FRED W. STUCKWISCH
Director of Contracts

Enclosure

APPENDIX O

ISSUES RELATED TO THE MANAGEMENT CONTRACT AND TRE DEVELOPMENT AND CONSTRUCTION AGREEMENT

The parties have requested that the NIGC expedite review of the December 14, 1999, submission of the Contract, DCA, and related documents. However, the parties continue to revise the associated documents. Accordingly, the NIGC has limited this review to the Contract and the DCA.

Contract Provisions

1. The NIGC has determined that the Contract and DCA together are management contracts and are subject to NIGC approval. As such, the combined agreements must contain a total cap, based on a percentage of net revenues, for all compensation to be paid to the Manager and Developer, as required by 25 C.F.R. § 531.1(i).

2. The Contract may not contain a term that exceeds the statutory limits outlined in 25 C.F.R. § 531.1(h). Although, § 6.5, p.28, states the term is seven (7) years from the Commencement Date, it is not sufficient. The definition of Commencement Date states that it is the first date that gaming occurs on a "contemporary basis" (§ 2, p.2). The terra must commence the day any gaming occurs, including gaining on a temporary basis.

3. Based on the justification submitted, the financial projections and capital investment do not require the proposed management fee and term. However, as to the term only, because the parties have stated that the financiers will

probably require the seven (7) year term, the NIGC will delay a determination until the project is closer to financing. 25 C.F.R. § 531.1(h)-(i).

4. Because the parties did not submit any Contract exhibits with the submission on December 14, 1999, the NIGC was unable to determine if the Contract complies with 25 C.F.R. § 531.1(k)(1) and (3). Once the Exhibits are submitted, we will determine if these provisions have been satisfied.

Submission Provisions

5. The parties will need to submit a fully revised and restated business plan with financial projections. This revised business plan must include:

    a. Four (4) complete sets of financial projections:

        i. Best Case for seven (7) years;

        ii. Conservative Case for seven (7) years;

        iii. Best Case for five (5) years; and,

        iv. Conservative Case for five (5) years;

    b. Statements of Cash Flow for all four scenarios for the gaming operation/gaming authority that includes debt repayments;

    c. Line items for all compensation to be paid to the Manager, Developer, and any other related person or entity that will receive payments from the gaming operation;

d. A breakdown of Project Cost separating the gaming facility from the non-gaming facility; and,

e. Assumptions used when preparing the plan.

Please note that the numbers contained in the Business Plan should be consistent with the numbers submitted to the BIA. Ali differences must be explained.

6. Mohawk Management will need to submit a revised list of all persons and entities identified in 25 C.F.R. § 537.1(a) and (c)(1), as required by 25 C.F.R. § 533.3(d). This list should include the percentage of financial interest in the contract for each person and must also include the information required under 25 C.F.Ri § 537.1(b)(1)(i) or the dates on which the information was previously submitted.

7. None of the Contract Exhibits were submitted with the Contact submission of December 14, 1999. When submitting a revised contact, the parties will need to submit current versions of all exhibits.

8. The documents reference numerous agreements that were cot submitted. The parties will need to submit:

   a. Disbursement and Escrow Agreement (DCA § 1, p.3);

   b. Senior Secured Note Indenture (DCA § 1, p.3);

   c. Senior Secured Notes (DCA § 1, p.3); and,

d. Memorandum of Understanding, as ratified by the Gaming Authority or Tribe (DCA § 1, p.5).

9. The Tribe will need to submit copies of resolutions passed on November 24, 1999, as referenced in the letter of January 5, 2000.

Other Issues

10. The definition for "Non-Casino Facility" will "mean all building, fixtures, and improvements located on the land adjacent to the Property or owned by Catskill Development, L.L.C., or any of its affiliates" (DCA § 1.1, p.5). The Project Costs include renovations, improvements or alterations to the Non-Casino Facility (DCA § 1.1, p.5). Regarding the improvements to the Non-Casino Facility, the parties will need to:

    a. Describe the planned improvements to the grandstand, track and land adjacent to the casino and other land owned by Catskill Development or any of its affiliates.

    b. Explain the financing for these improvements. It is not clear why the gaming operation should bear the financing costs associated with the improvements to the non-casino facility when the gaming operation will not be receiving any revenues from the non-casino facility.

    c. Explain why the agreed ceiling should cover project costs attributable to the non-casino facility.

    d. Explain why the Gaming Authority should pay a 3% development fee to the

Developer for improving/developing the Developer's land.

e. Provide a more detailed breakdown of the projected $505 million development and construction costs. The proposed facility is approximately 8 times the size of the Tribe's Akwesasne Casino and significantly more expensive.

Please note that improvements to the Non-Casino Facility may be considered additional compensation to the Manager and Developer.

11. The words "or such other parcel" will need to be deleted from the definition of Property in § 2, p.6.

12. Section 4.1, p.9, states that the GM will act on behalf of the Manager. The information required under 25 C.F.R. § 537.1(b) will need to be submitted for the GM prior to the GM performing any management services.

13. Section 4.1.2, p.9, lists reasons why the GM may be removed. In addition to the reasons listed, the GM must be removed if The Tribal Gaming Commission fails to license or revokes his/her license for any reason.

14. Section 4.1.3, p.10, must be changed. The Manager may not appoint an interim GM without the consent and licensing by the Gaming Authority.

15. Section 4.2.2, p.10, requires that the Tribe and Gaming Authority not take any action that will have a material adverse economic effect on the Manager. The Contract cannot prohibit the

Tribe or the Gaming Authority from legally revoking the Manager's gaming license.

16. The Tribe is requested to explain the relationship of the Gaming Authority to the Tribal Gaming Commission. It is not clear that the Tribal Gaming Commission's regulatory responsibilities will be independent from the Gaming Authority's management of the gaming operation. See §§ 3,4, p.8, 4.2.2, p.11, and 4.15, p.19.

17. Section 4.4.1, p.13, would allow the Manager to reopen and run the gaming operation over the Tribe's objections. The Tribe must retain a sole proprietary interest in the casino, including the right to close the gaming operation. The Contract must be changed.

18. We are concerned that the Manager can require the Gaming Authority to incur additional debt over its objections. Section 4.4.2, p.13, would allow the Manager, in its sole discretion, to borrow any funds necessary to reconstruct the gaming facility. It is possible that the Manager could lend the funds itself at a much higher rate than could be available from other sources.

19. The Tribe must maintain sole proprietary interest in, and governmental control over, the gaming operation. Included in this is the Tribe's right to approve all budgets. Section §§ 4.9, p.16, 4.10, pp.17-18, allows the Manager to force arbitration when there are disputes over approval of budgets. This must be changed.

20. Section 4.13, p.19, states that the Manager shall have the sole responsibility for determining the appropriate compensation to be paid to an employee. It is not clear if § 4.9, p.16, which requires Management Business Board approval of the budget, allows the Gaming Authority members to question and deny the level of compensation. This will need to be clarified.

21. We are concerned that as written, the Management Business Board will only approve revisions to the Enterprise Personnel Policies, but not approve the actual Enterprise Personnel Policies. It appears the Manager will establish these without approval § 4.16, p.19.

22. Section 4.26.4, p.24, states that the Management Business Board will determine depreciation schedules for all assets in accordance with GAAP. Because the assets are Tribal assets, the Tribe's independent CPA should also concur with the schedules.

23. It is not clear why the proposed establishment and funding requirements of reserve accounts are not part of the budget approval process. Section 6.3, p.25, would give these responsibilities to the Manager solely.

24. Any advances on the guaranteed minimum monthly payments may not accrue, interest. Section 6.4, p.26, must be changed.

25. Section 6.6, p.28, states that the Gaming Authority's Net Revenue payments will be payable to an Official of the Gaming Authority. These payments must be payable to the Gaming Authority of the Tribe.

26. The parties are requested to explain what funds the Manager plans to lend as referenced in § 7.11, p.31. Further, it should detail how the Manager plans to determine costs of funds versus the interest rate charged on Senior Secured Notes.

27. Section 7.20, p.32, allows the Manager to assign its right without the consent of the Gaming Authority. If the Gaming Authority will have the responsibility for licensing, then any assignment of any management responsibilities will require the consent of the Gaming Authority and the issuance of a Tribal Gaming License.

28. Section 8.5, p.34, is not consistent with 25 C.F.R. § 533.6(b)(1)(i). The NIGC Chairman must disapprove a management contract if an elected official of a tribal government has a direct or indirect financial interest in the Manager.

29. Section 12.3, p.39, is not consistent with the disclosure requirements of 25 C.F.R. § 537.2. The Manager may not assign these regulatory obligations to the Tribe.

30. Section 15.1.1, p.40, allows disputes over licensing and approval of budgets to go to arbitration. These items are governmental functions and may not go to arbitration.

31. Sections 15.2.5, p.41, and 19, p.42., allow the Status Quo to be preserved during disputes. If the Tribal Gaming Commission revokes the Manager's license, the Manager cannot continue to manage. The Contract must be changed.

32. Section 18, p.42, allows 30 days to cure any violation. Some violations may require immediate action. The Contract must be changed.

33. Exhibit A to the Amended and Restated Gaming Facility Development and Construction Agreement was not submitted. The parties will need to submit this exhibit.

34. As defined the Project Completion Date does not require any Tribal approval (DCA § 1, p.3). If the Tribe wants to require its approval that the gaming facility meets Tribal standards, then the DCA should be changed.

35. The Development Board will consist of two (2) representatives from the Tribe and the Developer. For an action of the Board to be effective, at least three (3) of the members must agree (DCA § 2.2, p.7). This must be changed to require a quorum of four (4) or require that both Tribal members be present and vote. The same comment applies to the Management Business Board.

36. The revocation of gaming license and approval of budgets may not be settled by binding arbitration. Sections 2.2, p.7, 2.4, p.8, 7.4, p.16, must be changed.

37. Because of prior comments by the Tribe regarding another situation, we offer the following observations:

    a. The DCA transfers all design and construction control over the gaming facility to the Developer (DCA § 2.3, p.7). If this is not what the Tribe wants, the agree-z ment and the recitals to the agreement should be changed.

b. DCA §§ 3.3, p.11, and 4, p.12. allows the Developer to decide to lease equipment rather than purchase. Leasing of gaming equipment can often result in a gaming operation paying many times the actual price to purchase the same equipment. Further, the Developer, or a subsidiary. could receive the lease payments. Thus. the Developer's best interest would not necessarily be the Tribe's best interest.

c. The Gaming Authority may wish to withhold a certain portion of the Developer's fee until all of the contractors and subcontractors have been paid and releases signed (DCA § 5.3, p.13).

38. The Justification submitted in November 1999. caps the Manager's reimbursable expenses at $20 million. The Justification by Alpha on February 28, 2000 states that the Manager's reimbursement, of development costs will be limited to $10 million. DCA § 5.4, pp. 13-14: does not Contain any Cap the reimbursable expenses. The parties will need to correct the inconsistencies

APPENDIX P

[Logo] National
Indian
Gaming
Commission

May 12, 2000

Mr. Thomas W. Aro
Executive Vice President
Alpha Hospitality Corporation
12 East 49th Street
24th Floor
New York, NY 10017

Dear Mr. Aro:

I am responding to your letter to Chairman Deer of May10, 2000, in which you ask for assistance in responding to reports which indicate that the National Indian Gaming Commission (NIGC) has formed or expressed an opinion as to the suitability of Alpha Hospitality Corporation to participate in an Indian gaming management contract with the St. Regis Mohawk Tribe.

Before the Chairman can approve a gaming management contract the Chairman must be satisfied with the terms of the contract and the suitability of the persons and entities which will participate in the contract. In the case of the management contract between the St. Regis Mohawk Tribe and Mohawk Management, L.L.C., there can be no approval before the land on which the facility will be sited is taken into trust and the state of New York has entered into a compact with the St. Regis Mohawk Tribe for the conduct of class DI gaming. Until those events occur, it is not appropriate to for

the Chairman to make a decision. Therefore, I do not believe that anyone who represents the National Indian Gaining Commission, which is to say anyone familiar with the status of our review of this contract, would have made a statement indicating we had determined that Alpha Hospitality was unsuitable.

It is unfortunate that the high visibility and widespread discussion of this matter may have resulted in some distortions of the position of this agency; and I trust this will serve to provide clarification.

Sincerely,

/s/ Barry W. Brandon
Barry W. Brandon
Chief of Staff

APPENDIX Q

AMENDED AND RESTATED LAND PURCHASE AGREEMENT

by and between

ST. REGIS MOHAWK GAMING AUTHORITY, PURCHASER

and

CATSKILL DEVELOPMENT, L.L.C., SELLER

Dated as of July 31, 1996

AMENDED AND RESTATED LAND PURCHASE AGREEMENT

AMENDED AND RESTATED LAND PURCHASE AGREEMENT, dated as of July 31, 1996, by and between the ST. REGIS MOHAWK GAMING AUTHORITY (the "Authority" or "Purchaser"), having an address c\o the St. Regis Mohawk Reservation, Route 37, Box 8A, Community Building, Hogansburg, New York 13655, and CATSKILL DEVELOPMENT, L.L.C. ("Seller"), a New York limited liability company, having an address at 730 Fifth Avenue, New York, New York 10022.

WHEREAS, Seller intends to convey (the "Trust Conveyance") certain land owned by it in fee simple located in Sullivan County, the State of New York as more particularly described on Exhibit A attached hereto and made a part hereof (the "Real Estate") to the United States of America to be held in trust for the benefit of the St. Regis Mohawk Tribe ("Tribe");

WHEREAS, the Tribe desires to use the Real Estate to improve the economic conditions of its mem-

bers and such Trust Conveyance shall directly benefit the Tribe and its members; and

WHEREAS, in consideration of and as a material inducement for the making of the Trust Conveyance, the Authority shall pay the Purchase Price (hereinafter defined); and

WHEREAS, Seller and Purchaser entered into a Land Sale Agreement, dated July 31, 1996 (the "Original Agreement") pursuant to which the parties set forth their agreement and understanding regarding the conveyance of certain property located in Sullivan County; and

WHEREAS, Seller and Purchaser desire to amend and restate certain of the terms, provisions and conditions of the Original Agreement and restate the terms, provisions and conditions of the Original Agreement in their entirety as provided herein and otherwise subject to the terms, provisions and conditions hereof.

NOW, THEREFORE, in consideration of the foregoing and the payment of ten dollars ($10) and other good and valuable consideration, the receipt and legal sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE I.

DEFINITIONS

Section 1.01. Definitions. As used in this Agreement, the following terms shall have the meanings specified below:

"*Affiliate*" of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For purposes of this definition,

"control" (including, with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise; *provided, however*, that, for purposes of Section 5.09 only, beneficial ownership of 10% or more of the voting securities of a Person shall be deemed to be control.

"*Authority*" means the St. Regis Mohawk Gaming Authority.

"*Bankruptcy Law*" means Title 11, U.S. Code or any similar federal or state law for the relief of debtors.

"*Business Day*" means any day other than a Legal Holiday.

"*Bureau of Indian Affairs*" or "*B.I.A.*" means the Bureau of Indian Affairs of the Department of the Interior of the United States of America.

"*Catskill Development*" means Catskill Development L.L.C., a New York limited liability company.

"*Closing*" shall have the meaning set forth in Section 9.01 hereof.

"*Closing Date*" shall have the meaning set forth in Section 9.01 hereof.

"*Closing Documents*" shall have the meaning set forth in Article 10 hereof.

"*Compact*" means the tribal-state compact, and any amendments or modifications thereto, entered into between the Tribe and the State of New York pursu-

ant to IGRA, or such other compact as may be substituted therefor.

"*Default*" means any event that is or with the passage of time or the giving of notice or both would be a default of any obligation under this Agreement.

"*Developer*" means Monticello Raceway Development Company, L.L.C.

"*Development and Construction Agreement*" means the Amended and Restated Gaming Facility Development and Construction Agreement, dated as of the date as of which their Agreement is made among the Authority, the Tribe and the Developer.

"*Management Agreement*" means the Amended and Restated Gaming Facility Management Agreement, dated as of the date as of which this Agreement is made among the Authority, the Tribe and the Manager.

"*Manager*" means Mohawk Management, L.L.C.

"*Material Adverse Effect*" shall have the meaning set forth in Section 5.05.

"*Permitted Exceptions*" means all title exceptions, defects and other matters set forth in the Title Evidence (including any violations listed therein or attached thereto) with respect to the Real Estate a copy of which is attached hereto and made a part hereof as Exhibit B excluding however, those items that are marked to be deleted or omitted.

"*Person*" means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof or any other entity.

"*Property*" means the parcel of land described on Exhibit A attached hereto, or such other parcel, approved by the Authority and Catskill Development to be held by the United States of America in trust for the Tribe upon which the Gaming Enterprise (as defined in the Management Agreement) is to be conducted, together with all buildings, improvements and fixtures, now or hereafter located thereon.

"*Real Estate*" shall have the meaning set forth in the recitals.

"*Title Company*" means Commonwealth Land Title Insurance Company.

"*Title Evidence*" means the Certificate and Report of Title issued by the Title Company, dated July 23, 1996, commitment number WP950964-"C", together with all endorsements thereto.

"*Transfer Taxes*" shall have the meaning set forth in Section 4.04 hereof.

"*Tribe*" means the St. Regis Mohawk Tribe, a federally recognized Indian tribe.

"*Trust Conveyance*" shall have the meaning set forth in the Recitals.

Section 1.02. Undefined Terms. All capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to those terms in the Management Agreement.

Section 1.03. Schedules, Exhibits, Etc. References to a "Schedule" or an "Exhibit" are, unless otherwise specified, to a Schedule or an Exhibit Attached to this Agreement; references to a "Section" or a "subdivision" are, unless otherwise specified, to a Section or a subdivision of this Agreement.

ARTICLE II.

THE TRANSACTION

Section 2.01. The Trust Conveyance. Subject to the terms of this Agreement, Seller agrees to sell, transfer, convey and assign and Purchaser agrees to accept from Seller, Seller's right, title and interest, in and to the Real Estate together with the buildings and improvements located thereon more particularly described on Exhibit B attached hereto and made a part hereof (the "Property") together with all easements, rights of way, reservations, privileges, appurtenances, and other estates and rights of Seller, if any, pertaining to its interest in the Real Estate. The Authority hereby directs and designates that the Transfer shall be made to the United States of America, in trust for the benefit of the Tribe.Section 2.02. Purchase Price. (a) The "Purchase Price" for the Property and the various assignments incidental thereto referred to herein is Ten Million Dollars ($10,000,000). The Purchase Price shall be payable in cash (by wire transfer) at the Closing as directed by Seller in writing at least two (2) Business Days prior to the Closing. Seller may direct, among other things, that Purchaser pay a portion of the Purchase Price at the Closing, in an amount or amounts specified by Seller, to person or entities other than Seller for Seller's purposes, including to the Title Company for the removal of certain encumbrances on title to the Real Estate and to the appropriate taxing authorities in payment of any applicable Transfer Taxes.(b)

Concurrently with the execution and delivery hereof Purchaser has agreed to perform certain covenants as provided herein.

ARTICLE III.

PERMITTED EXCEPTIONS; TITLE INSURANCE

Section 3.01. Title. Seller shall convey, and Purchaser, shall accept, fee simple title to the Property, which title shall be insurable by the Title Company at regular premiums, subject only to Permitted Exceptions. Seller acknowledges that the Permitted Exceptions are subject to review and approval by the United States of America, Department of Interior, Bureau of Indian Affairs.Section 3.02. Title Evidence. Buyer acknowledges that it (a) has received and reviewed the Title Evidence; (b) it approves the Permitted Exceptions; and (c) the Real Estate shall be conveyed subject only to Permitted Exceptions.Section 3.03. Title Issues. (a) If any update to the Title Evidence reflects any title exceptions that are not Permitted Exceptions and that Purchaser is not required to accept (the "Non-Permitted Exceptions"), Purchaser shall give written notice thereof to Seller within five (5) Business Days of Purchaser's receipt of such update, but in no event later than the Closing Date, and Seller shall (i) forthwith undertake due diligence to eliminate any and all of the Non-Permitted Exceptions that may be removed by the payment of a liquidated sum of money not in excess of $50,000 (the "Removal Amount"), in the aggregate, and (ii) remove (A) those exceptions willfully caused to be filed of record by Seller and (B) judgments against Seller and any payments required thereby. Seller shall have the right to adjourn the Closing Date, from time to time, up to thirty (30) days in the aggregate to remove/eliminate such exceptions.(b) In the event that there exist Non-Permitted Exceptions which Seller is not required to remove by Purchaser

pursuant to the terms of the preceding subparagraph, Purchaser shall consummate the transactions contemplated hereby subject to such additional exceptions and proceed to Closing without any reduction in the Purchase Price.

(c) If a search of the title discloses judgments, bankruptcies or other similar returns against other persons having names the same as, or similar to Seller, Seller, on request by Purchaser or the Title Company, shall deliver to Purchaser or the Title Company affidavits showing that such judgments, bankruptcies or other returns are not against Seller.

ARTICLE IV.

APPORTIONMENTS AND PAYMENTS

Section 4.01. Apportionments Relating to the Property.

(a) The following shall be apportioned between Seller and Purchaser on the Closing Date with respect to the Property, as of the close of business of the day immediately preceding the Closing Date (the "Apportionment Date"), and the Purchase Price shall be accordingly adjusted at the Closing:

(i) insurance premiums and other fees and charges under or with respect to policies of insurance assigned to Purchaser;

(ii) insurance proceeds received by Seller, if any, and payable to Purchaser pursuant to this Article 4 to the extent not applied to repair or restore the Property in accordance with the terms of this Agreement; and

(iii) water rates and charges, sewer taxes and rents, electricity and other utility charges applicable to the Property.

Section 4.02. Taxes and Assessments. The parties hereto acknowledge and agree that there shall be no proration of taxes (including, without limitation, real property taxes or vault taxes), and all such taxes paid by, or on behalf of, Seller shall be payable as provided in Section 5.4 of the Development and Construction Agreement as carrying costs thereunder.Section 4.03. Tax Refunds. To the extent that any refund of real property taxes, assessments, water rates and charges or sewer taxes and rents are made after the Closing Date and is applicable to a period before the Closing Date, such refund shall be payable to Seller or returned by Purchaser to Seller, subject to the reasonable pro rata costs incurred in obtaining same.Section 4.04. Transfer and Recording Taxes. (a) Seller shall be responsible (either by payment or exemption) for any real property transfer taxes, transfer gains taxes, and other similar taxes and fees imposed on Seller by the State of New York, or any other applicable county or municipality in which the Real Estate is located in connection with the Transfer (collectively, the "Transfer Taxes").(b) On the Closing Date, Purchaser and Seller shall deliver to the Title Company the returns, questionnaires, certificates, affidavits and other documents required in connection with the payment or exception of any Transfer Taxes, and other similar taxes and fees imposed by the state, county or municipality in which the Real Estate is located in connection with the transactions contemplated hereby (collectively, the "RE Tax Returns").

Section 4.05. Title Charges. Seller shall pay the cost of all title insurance premiums and the cost(s) of recording or filing the deed effectuating the Transfer.

ARTICLE V.

REPRESENTATIONS AND WARRANTIES OF PURCHASER

Section 5.01. Organization; Good Standing; No Subsidiaries.

The Purchaser is duly organized and validly existing as an instrumentality of the Tribe and has all requisite power and authority to carry on its business as it is being conducted. The Purchaser has no Subsidiaries.

Section 5.02. Power and Authority. The Purchaser has all requisite power and authority to execute, deliver and perform its obligations under this Agreement and to consummate the transactions contemplated hereby.Section 5.03. Due Authorization of this Agreement. This Agreement has been duly and validly authorized, executed and delivered by the Purchaser and is the legally valid and binding agreement of the Purchaser, enforceable against it in accordance with its terms.Section 5.04. No Violations. The execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the perform ance by the Purchaser of its obligations hereunder do not and will not conflict with or violate any law, rule, judgment, regulation, order, writ, injunction or de cree of any court or governmental entity having jurisdiction over the Purchaser or the Tribe, or to which the Authority or the Tribe is bound by, or breach any provisions of, or constitute a default under, any contract, agreement, instrument or obligation to which the Purchaser or the Tribe is bound.

Section 5.05. No Litigation. There is (a) no action, suit, proceeding or investigation before or by any

court, arbitrator or governmental agency, body or official, domestic or foreign, now pending or to the Purchaser's knowledge, threatened to which the Purchaser or the Tribe is or may be a party or to which the business or property of the Purchaser or the Tribe is or may be subject, (b) no statute, rule, regulation or order that has been enacted, adopted or issued by any governmental agency or that has been proposed by any governmental body or (c) no injunction, restraining order or order of any nature by a federal, state or tribal court or foreign court of competent jurisdiction to which the Purchaser or the Tribe is or may be subject or which their respective business, assets, or property is or may be subject, has been issued that, in the case of clauses (a), (b) and (c) above, (i) might, singularly or in the aggregate, result in a material adverse effect on the assets, liabilities, business, results of operations, condition (financial or otherwise), cash flows, affairs or prospects of the Purchaser or the Tribe, or (ii) in any manner draw into question the validity of this Agreement (any of the events set forth in clauses (i) or (ii) a "Material Adverse Effect").Section 5.06. No Governmental Action. No action has been taken and no statute, rule, regulation or order has been enacted, adopted or issued by any governmental agency that prevents the Transfer; no injunction, restraining order or order of any nature by a federal, state, tribal or municipal court or any governmental authority or agency or any other tribunal of competent jurisdiction has been issued that prevents the Transfer.Section 5.07. Full Disclosure. All of the factual information heretofore or contemporaneously furnished by or on behalf of the Purchaser and the Tribe in writing to Seller is, in its entirety, correct and accurate in all material respects and is not incomplete by omitting to state

any fact necessary to make such information not misleading in light of the circumstances under which such information was provided to Seller. There is no fact or liability known to the Purchaser which could reasonably be expected to have a Material Adverse Effect which has not been disclosed herein or in such other documents, certificates and statements furnished to Seller or its counsel.

ARTICLE VI.

REPRESENTATIONS AND WARRANTIES OF SELLER

Section 6.01 Organization; Good Standing. Seller is duly formed and validly existing under the laws of the State of New York as a limited liability company and has all requisite power and authority to carry on its business as it is currently being conducted.Section 6.02. Power and Authority. Seller has all requisite power and authority to execute, deliver and perform its obligations under this Agreement and to consummate the transactions contemplated hereby.Section 6.03. Binding Agreement. This Agreement has been duly and validly authorized, executed and delivered by the Seller and is the legally valid and binding agreement of the Seller, enforceable against it in accordance with its terms.Section 6.04. No Violations. The execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the performance by Seller of its obligations hereunder do not and will not conflict with or violate any law, rule, judgment, regulation, order, writ, injunction or decree of any court or governmental entity having jurisdiction over Seller or any of the parties comprising Seller, or to which Seller or any of the parties comprising Seller is bound by, or breach any

provisions of, or constitute a default under, any contract, agreement, instrument or obligation to which Seller or any of the parties comprising Seller is a party or by which any of them is bound.Section 6.05. Taxes. All tax returns required to be filed, and other filings required to be made by Seller have been so filed. All taxes, including withholding taxes, penalties and interest, assessments, fees and other charges due or claimed to be due from such entities or that are due and payable have been paid, other than those being contested in good faith and for which adequate reserves have been provided or those currently payable without penalty or interest. To the knowledge of the Seller, there are no material proposed additional tax assessments against the Seller, or its assets or properties.Section 6.06. Parties in Possession. To Seller's knowledge, without investigation, there are no parties with any rights of possession in the Property, except as to grantees of the Permitted Exceptions.Section 6.07. Violations. To Seller's knowledge, without investigation, no written notices of violation of any law or municipal ordinances or of federal, state, county or municipal or other governmental agency regulations, orders or requirements relating to the Property have been entered against the Real Estate or received by Seller.Section 6.08. Litigation. There is (a) no action, suit, proceeding or investigation before or by any court, arbitrator or governmental agency, body or official, domestic or foreign, now pending or to the Seller's knowledge, threatened to which the Seller is or may be a party or to which the business or property of the Seller is or may be subject, (b) no statute, rule, regulation or order that has been enacted, adopted or issued by any governmental agency or that has been proposed by any governmental body or

(c) no injunction, restraining order or order of any nature by a federal, state or tribal court or foreign court of competent jurisdiction to which the Seller is, or may be subject or which its business, assets or property is or may be subject, has been issued that, in the case of clauses (a), (b), and (c) above, (i) might singularly or in the aggregate, result in a material adverse effect on the assets, liabilities, business, results of operations, conditions (financial or otherwise), cash flows or affairs of the Seller, or (ii) in any manner draw into question the validity of this Agreement.Section 6.09. Other Contracts. The execution and delivery of this Agreement, the consummation of the transactions herein contemplated, and compliance with the terms of this Agreement will not conflict with, or, with or without notice or the passage of time, result in a breach of, any of the terms or provisions of, or constitute a default under, any instrument to which Seller is a party or by which Seller or the Property is bound, or any applicable regulation of any governmental agency, or judgment, order or decree of any court having jurisdiction over Seller or its properties.ARTICLE VII.

REAL ESTATE COVENANTS

The Purchaser and Seller covenant as follows:

Section 7.01. Maintenance of the Property. Seller shall cause the Property to be maintained and operated in good condition and repair (reasonable wear, tear and casualty excepted) including, the maintenance of existing casualty and liability insurance with respect to the Property in coverages and amounts in accordance with commercially reasonably prudent standards and shall not sell, encumber or otherwise dispose of all or any portion of the Property

or any material items of personalty unless replaced with an item of similar quality, utility and value or except in the ordinary course of business.Section 7.02. Casualty. If on or prior to the Closing Date, all or any portion of the Real Estate shall be damaged by any casualty, the parties hereto shall not be relieved of its obligations under this Agreement, including the obligation to consummate the Trust Conveyance and any and all net insurance proceeds payable as a result of such casualty shall be used (a) to restore or repair such damaged property to the extent necessary so as not to cause or remain a dangerous or life threatening condition and (b) to restore the grandstand building and any other improvements which are intended to be used in common by the parties hereto pursuant to any other agreements executed in connection with the transactions contemplated by the Trust Conveyance or related thereto. Seller shall be responsible for repairing or restoring any portion of the Real Estate damaged by any casualty that occurs on or prior to the Closing Date as aforesaid and Purchaser shall be entitled to receive all excess insurance proceeds after such restoration in connection with such casualty.Section 7.03. Recording. Purchaser agrees that it has no right to and shall not put, or cause to be put, of record, this Agreement or a memorandum or other writing thereof without the prior written consent of Seller which consent may be granted or withheld in Seller's sole discretion.Section 7.04. Not an Offer. The parties hereto acknowledge and agree that this Agreement is not an offer of the Property from Seller to Purchaser. This Agreement is offered for signature by Purchaser and it is understood that this Agreement shall not be binding upon Seller or Purchaser unless and until Seller and Purchaser

shall each have executed and unconditionally delivered a fully executed copy of this Agreement to the other.ARTICLE VIII.

COVENANTS OF THE AUTHORITY

From the date hereof until the Transfer, the Authority covenants as follows:

Section 8.01. BIA Filing. The Authority shall use its reasonable best efforts to cause this Agreement together with any other documents necessary to effectuate the Transfer to be filed with the B.I.A.Section 8.02. BIA Approval. The Authority shall (and shall cause the Tribe to) cooperate with Seller and any of its Affiliates and use Authority's reasonable best efforts in good faith to assist in obtaining the approval of the B.I.A. of the Trust Conveyance and any other documents or transactions related thereto.Section 8.03. Existence of the Authority. The Authority shall do or cause to be done all things necessary to preserve and keep in full force and effect (i) its existence in accordance with the respective organizational, statutory, constitutional or legal documents (as the same may be amended from time to time) of the Authority or the Tribe and (ii) the rights (charter and statutory), licenses and franchises of the Authority.Section 8.04. Use of Proceeds. The Authority shall use the net proceeds from the sale of the Senior Secured Notes only for the acquisition, construction, development and operation of the Project and any other use permitted under the Senior Secured Note Indenture and to pay all fees and expenses in connection therewith. The Authority shall cause the net proceeds from the sale of the Senior Secured Notes to be deposited into the Escrow Account and disbursed only in accordance with the Disbursement and Escrow Agreement.ARTICLE IX.

CLOSING

Section 9.01. Closing Date. The consummation of the transactions contemplated by this Agreement (the "Closing") shall take place upon ten (10) days' notice from Purchaser to Seller on a date that shall be not later than December 31, 1999, as to which date, TIME SHALL BE OF THE ESSENCE with respect to Purchaser. Such date, or any other date to which the Closing may be adjourned by Seller (in no event shall Seller have the right to extend the Closing past June 30, 2000, as to which date, TIME SHALL BE OF THE ESSENCE), is referred to herein as the "Closing Date". The Closing shall be held at the offices of Sellers attorneys, Latham & Watkins, 885 Third Avenue, New York, New York 10022.Section 9.02. Seller's Conditions to Closing. Seller's obligation to Transfer the Real Estate is subject to the fulfillment to Seller's reasonable satisfaction, prior to or at the Closing, of the following conditions:(a) All of the representations and warranties of the Purchaser contained in this Agreement shall be true and correct on the date hereof and on the Closing Date with the same force and effect as if made on and as of the date hereof and the Closing Date, respectively, except that any representations and warranties that relate solely to a particular date or period shall be true and correct as of such date or period.

(b) Purchaser shall have performed and complied with all agreements and conditions contained in this Agreement required to be performed or complied with by it prior to or at the Closing and at the time of the Closing no Default shall have occurred and be continuing.

(c) No action shall have been taken and no statute, rule, regulation or order shall have been enacted, adopted or issued by any governmental agency which would, as of the Closing Date, have a Material Adverse Effect; no action, suit, proceeding or investigation shall have been commenced and be pending against or affecting or, to the knowledge of the Purchaser threatened against, the Purchaser before any court or governmental agency, body or administrative agency or authority that, if adversely determined, might result in a Material Adverse Effect; and no stop order shall have been issued preventing the Trust Conveyance or which might have a Material Adverse Effect.

(d) Seller shall have received certificates, dated the Closing Date, signed by two members of the Management Board confirming, as of the Closing Date, the matters set forth in paragraphs (a), (b) and (c) of this Section 9.02.

(e) Seller shall have received on the Closing Date the opinion (satisfactory to Seller and Seller's counsel), dated the Closing Date of Hobbs, Straus, Dean & Walker, counsel for the Authority, addressed to Seller, to the effect that:

(i) The Purchaser is validly existing as an instrumentality of the Tribe and has all requisite power and authority to carry on its business as it is being conducted and as it is proposed to be conducted.

(ii) The Purchaser has all requisite power and authority to execute, deliver and perform its obligations under this Agreement and to consummate the transactions contemplated hereby, in-

cluding, without limitation, the payment of the Purchase Price.

(iii) This Agreement has been duly and validly authorized, executed and delivered by the Purchaser and is the legally valid and binding agreement of the Purchaser enforceable against it in accordance with its terms, except as rights of indemnity may be limited by state and federal securities laws, and except as such enforceability may be limited by bankruptcy, insolvency, fraudulent conveyance, reorganization or similar laws affecting the rights of creditors generally and subject to general principles of equity.

(f) At the Closing, Purchaser shall have executed and delivered the Closing Documents to Seller or the Title Company together with such other documents and instruments as the Title Company or Seller may reasonably request to effectuate the Transfer.

(g) Contemporaneously with the Closing, the financing transactions evidenced by the Senior Secured Notes (as defined in the Management Agreement) shall be consummated and all documents necessary and incidental thereto shall be executed and delivered by the appropriate parties.

Section 9.03. Purchaser's Conditions to Closing. Purchaser's obligation to purchase the Real Estate is subject to the fulfillment prior to, or at the Closing of the following conditions:(a) All of the representations and warranties of the Seller contained in this Agreement shall be true and correct on the date hereof and on the Closing Date with the same force and effect as if made on and as of the date hereof and the Closing Date, respectively, except that any representations and warranties that relate solely

to a particular date or period shall be true and correct as of such date or period.

(b) The Seller shall have performed and complied with all agreements and conditions contained in this Agreement required to be performed or complied with by it prior to or at the Closing and at the time of the Closing no Default shall have occurred and be continuing.

(c) No action shall have been taken and no statute, rule, regulation or order shall have been enacted, adopted or issued by any governmental agency which would, as of the Closing Date, have a Material Adverse Effect; no action, suit, proceeding or investigation shall have been commenced and be pending against or affecting or, to the knowledge of the Seller threatened against, the Seller before any court or governmental agency, body or administrative agency or authority that, if adversely determined, might result in a Material Adverse Effect; and no stop order shall have been issued preventing the Transfer or which might have a Material Adverse Effect.

(d) Purchaser shall have received certificates, dated the Closing Date, signed by the manager or other authorized party of Catskill confirming, as of the Closing Date, the matters set forth in paragraphs (a), (b) and (c) of this Section 9.03.

(e) At the Closing, Seller shall have executed and delivered the Closing Documents to Purchaser or the Title Company together with such other documents and instruments as the Title Company or Purchaser may reasonably request to effectuate the Transfer.

(f) Contemporaneously with the Closing, the financing transactions evidenced by the Senior Secured Notes (as defined in the Management Agree-

ment) shall be consummated and all documents necessary and incidental thereto shall be executed and delivered by the appropriate parties.

ARTICLE X.

CLOSING DOCUMENTS

Section 10.01. Closing. (a) At the Closing, contemporaneously with Purchaser's delivery to Seller of all of the Closing Documents required to be delivered by Purchaser hereunder, Seller shall deliver or cause to be delivered to Purchaser, duly executed by Seller in recordable form, where applicable (the documents described in this Section 10.01 and all other documents required to be delivered hereunder are referred to collectively as the "Closing Documents"), those Closing Documents to be delivered by Seller as set forth on Schedule 1 attached hereto and made a part hereof.

(b) At the Closing, contemporaneously with Seller's delivery to Purchaser of all of the Closing Documents required to be delivered by Seller hereunder, Purchaser shall deliver or cause to be delivered to Seller those Closing Documents to be delivered by Purchaser duly executed by Purchaser in recordable form, where applicable, as set forth on Schedule 2 attached hereto and made a part hereof.

Section 10.02. Further Assurances. Seller and Buyer each agree, at any time and from time to time at or after the Closing, to execute, acknowledge where appropriate, and deliver or cause to be executed, acknowledged and delivered such further in-

struments and documents and to take such other action as the other of them or the Title Company may reasonably request to carry out the intents and purposes of this Agreement. The provisions of this Section 10.02 shall survive the Closing.ARTICLE XI.

BROKERS

Seller and Purchaser each represent and warrant to the other that it has not dealt with any broker or agent in connection with the transaction contemplated by this Agreement. Purchaser hereby indemnifies Seller and Seller's Affiliates and holds Seller and Seller's Affiliates harmless from and against any and all claims for commission, fee or other compensation by any Person, who shall claim to have dealt with Purchaser or any of Purchaser's Affiliates in connection with this Agreement and for any and all costs incurred by Seller and Seller's Affiliates in connection with such claims, including reasonable attorneys fees and disbursements. Seller hereby indemnifies Purchaser and Purchaser's Affiliates and holds Purchaser and Purchaser's Affiliates harmless from and against any and all claims for commission, fee or other compensation by any Person who shall claim to have dealt with Seller or any of Seller's Affiliates in connection with this Agreement and for any and all costs incurred by Purchaser in connection with such claims, including reasonable attorneys' fees and disbursements. The provisions of this Article 11 shall survive the Closing or the earlier termination of this Agreement.

ARTICLE XII.

DEFAULTS; REMEDIES

Section 12.01. Purchaser's Default. If Seller shall have performed all of its obligations under this

Agreement and all conditions to Purchaser's obligation to proceed with the Closing shall have been satisfied or waived, and if Purchaser shall (a) fail or refuse to close as required by the terms of this Agreement, or (b) otherwise be in default hereunder, the parties hereto agree that the damages that Seller would sustain as a result thereof would be substantial, and would be difficult to ascertain. Accordingly, the parties hereto agree that in the event of such default, failure or refusal by Purchaser, Seller's sole remedy shall be to seek specific enforcement by Purchaser of its obligations under this Agreement.

Section 12.02. Seller's Default. If Purchaser shall have performed all of its obligations under this Agreement and all conditions to Seller's obligation to proceed with the Closing shall have been satisfied or waived, and if Seller shall (a) fail or refuse to close as required by the terms of this Agreement or (b) otherwise be in default hereunder, which default shall continue unremedied for five (5) Business Days after notice from Purchaser thereof, then Purchaser shall be entitled to seek specific performance by Seller of its obligations under this Agreement. Purchaser expressly agrees however that Purchaser shall not have the right to seek to recover any direct or indirect, consequential, actual or punitive damages, or any similar additional sums or amounts by reason of such failure or refusal.

ARTICLE XIII.

AS-IS; WHERE-IS; DISCLAIMER

Section 13.01. As-is; Where-is; Disclaimer.

(a) PURCHASER ACKNOWLEDGES AND REALIZES THE NATURE OF THIS TRANSACTION, UNDERSTANDS AND IS FREELY TAKING

ALL RISKS, IF ANY, INVOLVED IN CONNECTION WITH THIS TRANSACTION AND ACKNOWLEDGES THAT THE SAME IS REFLECTED IN THE PURCHASE PRICE AND THE TERMS UPON WHICH SELLER IS WILLING TO TRANSFER THE PROPERTY.

(b) EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, INCLUDING MATERIAL ADVERSE CHANGES, THE PROPERTY IS BEING SOLD BY SELLER AND PURCHASER AGREES TO ACCEPT THE PROPERTY "AS-IS" AND "WHERE-IS", IN ITS CONDITION ON THE DATE HEREOF. PURCHASER ACKNOWLEDGES, REPRESENTS AND WARRANTS THAT (I) PURCHASER HAS HAD AN OPPORTUNITY TO MAKE AN INDEPENDENT INVESTIGATION AND EXAMINATION OF THE PROPERTY (AND ALL MATTERS RELATED THERETO), AND TO BECOME FULLY FAMILIAR WITH THE PHYSICAL CONDITION OF THE PROPERTY, AND (II) SELLER AND SELLER-RELATED PARTIES HAVE NOT MADE AND SHALL NOT MAKE ANY VERBAL OR WRITTEN REPRESENTATIONS, WARRANTIES OR STATEMENTS OF ANY NATURE OR KIND WHATSOEVER TO PURCHASER, WHETHER EXPRESS OR IMPLIED, WITH RESPECT TO THE ABOVE, AND, IN PARTICULAR, EXCEPT AS EXPRESSLY SET FORTH HEREIN, NO REPRESENTATIONS OR WARRANTIES HAVE BEEN MADE OR SHALL BE MADE WITH RESPECT TO (A) THE PHYSICAL CONDITION OR OPERATION OF THE PROPERTY, INCLUDING THE EXISTENCE OF ANY ENVIRONMENTAL HAZARDS OR CONDITIONS THEREON (INCLUDING THE PRESENCE OF ASBESTOS OR ASBESTOS-CONTAINING MATERIALS OR THE RE-

LEASE OR THREATENED RELEASE OF HAZARDOUS SUBSTANCES), (B) THE REVENUES OR EXPENSES OF THE PROPERTY, (C) THE ZONING AND OTHER LEGAL REQUIREMENTS APPLICABLE TO THE PROPERTY OR THE COMPLIANCE OF THE PROPERTY THEREWITH, (D) SUBJECT TO THE WARRANTIES SET FORTH IN THE DEED TO BE DELIVERED BY SELLER, THE NATURE AND EXTENT OF ANY MATTER AFFECTING TITLE TO THE REAL ESTATE OR TO ANY PERSONALTY, (E) THE QUANTITY, QUALITY, OR CONDITION OF THE PERSONALTY, OR (F) ANY OTHER MATTER OR THING AFFECTING OR RELATING TO THE PROPERTY, OR ANY PORTION THEREOF, THE INTERESTS THEREIN TO BE CONVEYED TO PURCHASER PURSUANT TO THE TERMS OR THE TRANSACTIONS CONTEMPLATED HEREBY.

(c) EXCEPT AS SET FORTH HEREIN, SELLER HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY, ORAL OR WRITTEN, EXPRESS OR IMPLIED OR ARISING BY OPERATION OF LAW OR OTHERWISE, WITH RESPECT TO THE MATTERS REFERRED TO IN THIS SECTION AND ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN RESPECT TO THE PROPERTY. PURCHASER DECLARES AND ACKNOWLEDGES THAT THIS EXPRESS DISCLAIMER SHALL BE CONSIDERED A MATERIAL AND INTEGRAL PART OF THE TRANSFER AND IS REFLECTED IN THE CONSIDERATION GIVEN BY PURCHASER HEREUNDER, AND AS AN INDUCEMENT FOR SELLER TO PROCEED WITH THIS TRANSACTION, PURCHASER FURTHER DECLARES AND ACKNOWLEDGES THAT THIS

DISCLAIMER HAS BEEN BROUGHT TO THE ATTENTION OF PURCHASER AND EXPLAINED IN DETAIL AND THAT PURCHASER HAS VOLUNTARILY AND KNOWINGLY CONSENTED THERETO THE PROVISIONS OF THIS ARTICLE THIRTEEN SHALL SURVIVE THE CLOSING DATE.

ARTICLE XIV.

MISCELLANEOUS

Section 14.01. Reasonableness. Whenever the consent or approval of any party under this Agreement is required, such consent or approval shall not be unreasonably withheld, unless specifically provided otherwise. Further, whenever any provision of this agreement requires the exercise of "reasonable" consent, judgment, efforts, best efforts or "commercially prudent" efforts the standard for such reasonableness of commercial prudence shall be conduct consistent with the actions of a prudent commercial business person or prudent commercial owner. Section 14.02. Survival of Representations and Warranties; Severability. All representations and warranties contained in this Agreement or made in writing by or on behalf of the Purchaser in connection with the transactions contemplated by this Agreement shall survive, for the duration of any statutes of limitation applicable thereto, the execution and delivery of this Agreement or any investigation at any time made by Seller or on Seller's behalf. All statements contained in any certificate or other instrument delivered by or on behalf of the Purchaser pursuant to this Agreement or in connection with the transactions contemplated by this Agreement shall be deemed representations and warranties of the Purchaser under this Agreement. Any provision of this Agreement that is prohibited or

unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or affecting the validity or enforceability of such provisions in any other jurisdiction.

Section 14.03. Entire Agreement; Amendment and Waiver. This Agreement contains the entire understanding between the parties with respect to the subject matter hereof. This Agreement shall not be altered or otherwise amended except pursuant to an instrument in writing executed and delivered on behalf of Seller and Purchaser.

Section 14.04. Notices, etc. Except as otherwise provided in this Agreement, any notice, waiver, consent or other communication required or permitted hereunder shall be in writing and shall be delivered personally (including delivery by a nationally recognized courier service), by pre-paid telegram or by pre-paid registered or certified mail, return receipt requested, addressed (a) if to Seller, at such address as Seller shall have furnished to Purchaser in writing, with a copy to Latham & Watkins, 885 Third Avenue, New York, New York 10022, Attention: James I. Hisiger, Esq., or (b) if to the Purchaser, at the address of its principal executive offices, to the attention of the authorized representative executing this Agreement, or at such other address, or to the attention of such other officer, as the Purchaser shall have furnished to Seller, with a copy to Hobbs, Straus, Dean & Walker, 1819 H Street, N.W., Washington, D.C. 20006, Attention: Hans Walker, Esq.

Notice hereunder shall be deemed to have been received and be effective for all purposes hereunder (a) if given by pre-paid certified or registered mail, re-

turn receipt requested, on the fifth (5th) Business Day after mailing (b) if given by hand delivery, the day of delivery with signed receipt or (c) if given by any other means, when delivered at the address specified in this Section with signed receipt. The address of any party hereto may be changed by a notice in writing given in accordance with the provisions hereof.

Section 14.05. Successors and Assigns. Whenever in this Agreement any of the parties hereto is referred to, such reference shall be deemed to include the successors and assigns of such party, and all covenants and agreements of the Purchaser and Seller in this Agreement shall bind their respective successors and assigns. The Purchaser may not assign or transfer its rights or obligations hereunder without the prior written consent of Seller.

Section 14.06. Descriptive Headings. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning hereof.

Section 14.07. No Personal Liability of Directors, Officers, Employees and Stockholders. Neither the Tribe, nor any officer, office holder, agent, representative employee, member of the Purchaser or the Tribe, as such, shall have any personal liability for any obligations of the Purchaser under this Agreement or, for any claim based on, in respect of, or by reason of, such obligations or their creation.

Section 14.08. Governing Law. THE INTERNAL LAW OF THE STATE OF NEW YORK SHALL GOVERN AND BE USED TO CONSTRUE THIS AGREEMENT.

Section 14.09. Judicial Proceedings; Waiver of Jury. Any judicial proceeding brought against either party hereto may be brought in any court of competent jurisdiction in the State of New York or of the United States of America for the State of New York and, by execution and delivery of this Agreement, each such party (a) accepts, generally and unconditionally, the nonexclusive jurisdiction of such courts and any related appellate court, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement, subject to any rights of appeal, and (b) irrevocably waives any objection it may now or hereafter have as to the venue of any such suit, action or proceeding brought in such a court or that such court is an inconvenient forum. Each party hereto hereby waives personal service of process and consent that service of process upon it may be made by certified or registered mail, return receipt requested, at its address specified or determined in accordance with the provisions of Section 14.04, and service so made shall be deemed completed on the third Business Day after such service is deposited in the mail. EACH PARTY HERETO HEREBY WAIVES TRIAL BY JURY IN ANY JUDICIAL PROCEEDING INVOLVING, DIRECTLY, OR INDIRECTLY, ANY MATTER (WHETHER SOUNDING IN TORT, CONTRACT OR OTHERWISE) IN ANY WAY ARISING OUT OF, RELATED TO, OR CONNECTED WITH THIS AGREEMENT.

Section 14.10. Dispute Resolution and Consent to Suit. The Purchaser does hereby consent to the enforcement and execution of any judgment, whether obtained as a result of judicial, administrative, or arbitrational proceedings, against any assets of the Purchaser. Subject to the foregoing, the Purchaser does hereby waive its sovereign immunity from un-

consented suit, whether such suit be brought in law or in equity, or in administrative proceedings or proceedings in arbitration, to permit the commencement, maintenance, and enforcement of any action, by any person with standing to maintain an action, to interpret or enforce the terms of this Agreement, and to enforce and execute any judgment resulting therefrom against the Purchaser or the assets of the Purchaser. Notwithstanding any other provision of law or canon of construction, the Purchaser intends this waiver to be interpreted liberally to permit the full litigation of disputes arising under or out of this Agreement. Without limiting the generality of the foregoing, Purchaser waives its immunity from unconsented suit to permit the maintenance of the following actions:

(a) Courts. The Purchaser waives its immunity from unconsented suit to permit any court of competent jurisdiction to (i) enforce and interpret the terms of this Agreement; (ii) determine whether any consent or approval of the Purchaser has been improperly granted or unreasonably withheld; (iii) enforce any judgment prohibiting the Purchaser to take any action, including a judgment compelling the Purchaser to submit to binding arbitration; and (iv) adjudicate any claim under the Indian Civil Rights Act of 1968. 25 U.S.C. § 1302 (1944).

(b) Arbitration. The Purchaser waives its immunity from unconsented suit to permit arbitrators, appointed and acting under the commercial arbitration rules of the American Arbitration Association pursuant to the Expedited Procedures provisions (Rule 53 through 57 in the current edition), to (i) enforce and interpret the terms of this Agreement; (ii) determine whether any consent or approval of the Purchaser

has been unreasonably withheld; and (iii) enforce any judgment prohibiting the Purchaser from taking any action, including a judgment compelling the Purchaser to submit to binding arbitration.

Section 14.11. Counterparts. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

SIGNATURES COMMENCE ON FOLLOWING PAGE.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

ST. REGIS MOHAWK GAMING AUTHORITY

By:_____

Hilda E. Smoke, Chairwoman
Management Board

CATSKILL DEVELOPMENT, L.L.C.

By:_____

[ ]
Authorized Signatory

CERTIFICATION: This is to hereby certify that the above was duly executed by an officer of the St. Regis Mohawk Gaming Authority pursuant to the authority vested therein.

_____ _____
Carol T. Herne, Tribal Clerk Date

Attachment to Land Purchase Agreement

SECTION 81 COMPLIANCE

In compliance with Section 81 of Title 25 U.S.C.A., the residence and occupation of the parties is as follows:

Party in Interest:	St. Regis Mohawk Gaming Authority
Address:	St. Regis Mohawk Reservation Community Building Route 37, Box 8A Hogansburg, New York 13655
Occupation	Tribal Gaming Authority
Party in Interest	Catskill Development, L.L.C.
Address:	Route 17B PO Box 5013 Monticello, New York 12701-5193
Occupation	Real Estate and Raceway Company
Fixed limited time to run:	The sale of the real estate is to be consummated no later than January 3, 1997 (see Section 9.01).

The Chairwoman of the Management Board of the St. Regis Mohawk Gaming Authority ("Management Board") is authorized to execute the attached document by Resolution No. 96 6A 1 of the Management Board, dated _____. Such authority is exercised in this instance because the Management Board has determined that execution of the attached document will further the economic development objectives of the Tribe.

The document was executed on or about ____ p.m. on _____ at Massena, New York, for the particular purpose set forth above.

The undersigned parties agree that the foregoing agreement is in compliance with 25 U.S.C. § 81.

WITNESS: St. Regis Mohawk Gaming Authority

By:_____
Hilda E. Smoke
Chairwoman, Management Board

WITNESS: Catskill Development, L.L.C.

By: _____
Name:
Title: Authorized Signatory

Approved Pursuant to 25 U.S.C.§ 81

United States Department of Interior
Bureau of Indiana Affairs:

Dated: By:_____

_____, 1999 Director (Acting)
Eastern Area Office
Bureau of Indian Affairs for the Secretary of the Interior and the Commissioner of Indian Affairs, acting under delegated authority

EXHIBIT A

Real Estate

Fulton Engineering & Surveying Co.
George H. Fulton
Licensed Land Surveyor
P.O. Box 950
Livingston Manor, New York 12758
(914) 439-5578

29.31 ACRE PARCEL DESCRIPTION
See Map No: VM-101-1-1.1E
TH-12-1-46.2E

All that tract or parcel of land situate in the Village of Monticello, Town of Thompson, County of Sullivan, State of New York, being bounded and described as follows:

Beginning at an iron pin set on the west bounds of the herein described parcel, said point of beginning being east of Kaufman Road-County Road No. 59, west of New York State Route 17-Quickway, and north of New York State Route 17B-State Highway No. 890, said point of beginning being further described as follows:

Being South 69°–00' East 427.79 feet from an iron pin found at the northeast corner of lands of New York State Electric and Gas Corporation as described in Liber 562 of Deeds at Page 464 and Liber 572 of Deeds at Page 27, and,

Being South 28°–16' West 1576.80 feet from a concrete highway monument found on the west bounds of Parcel No. 79 of the taking for New York State Route 17-Quickway, and,

Being North 82°–06' West 1679.49 feet from a concrete highway monument found on the west

bounds of Parcel No. 70 of the taking for New York State Route 17-Quickway, and,

Being North 18°–58' West 2223.09 feet from a concrete highway monument found on the north bounds of New York State Route 17B-State Highway No. 890, and,

Being North 6°–07' East 1630.98 feet from a concrete highway monument found on the north bounds of said New York State Route 17B, and running thence from said place of beginning North 11°–32' West 900.00 feet to a point; thence North 78°–28' East 739.23 feet to a point; thence South 66°–14' East 166.35 feet to a point; thence on a curve to the right having a radius of 350.00 feet for an arc length of 244.25 feet, the chord of said arc being defined by the course South 46°–14' East 239.33 feet and the central angle of said arc being 39°–59'–05"; thence South 26°–15' East 627.69 feet to a point on the north bounds of access easement "B" hereinafter described; thence South 78°–28' West 510.64 feet passing along the north bounds of said easement to a point; thence South 11°–32' East 290.00 feet passing along the common line between easements "B" and "C" as hereinafter described and continuing on a projection of said common line to a point; thence North 78°–28' East 160.00 feet to a point; thence South 11°–32' East 260.00 feet to a point; thence South 78°–28' West 260.00 feet to a point within the existing grandstand building; thence South 11°–32' East 14.21 feet to a point; thence South 85°–28' West 106.04 feet to a point; thence South 4°–32' East 39.00 feet to a point; thence South 78°–28' West 210.00 feet to a point; thence North 18°–32' West 119.11 feet to a point; thence South 71°–

28' West 10.00 feet to a point; thence North 18°–32' West 31.52 feet to a point; thence North 56°–32' West 101.42 feet to a point, said course leaving said grandstand building; thence North 11°–32' West 40.00 feet to a point; thence South 78°–28' West 120.00 feet to a point; thence North 11°–32' West 210.00 feet to a point on the south bounds of access easement "A" hereinafter described; thence North 78°–28' East 140.00 feet passing along the bounds of access easement "A" to a point; thence North 11°–32' West 120.00 feet passing along the common line between access easements "A" and "C" to a point; thence South 78°–28' West 160.00 feet passing along the north line of access easement "A" to the point or place of beginning containing 29.31 acres of land.

RESERVING unto the Party of the First Part, its successors and assigns, and all subsequent owners of that portion of the lands and premises conveyed by and described in a deed from Berenson Pari-Mutuel of New York, Inc. and Sullivan County Harness Racing Realty Corporation to Catskill Development, L.L.C., dated June , 1996 and recorded in the Sullivan County Clerk's Office on June , 1996 in Liber of Land Records, at Page , retained by the Party of the First Part, the right, privilege and easement to go in, on, over, under and upon that portion of the above described 29.31 acre parcel of land above referred to as easement "C", for all purposes and by all means, including but not limited to ingress, egress and access to and from those portions of said premises retained by the Party of the First Party lying both easterly and westerly of the above described and aforementioned 29.31 acre parcel of land, which said easement "C" is more particularly bounded and described as follows:

Beginning at a point on the westerly bounds of the above described 29.31 acre parcel, said point of beginning being the common northerly corner of access easements "A" and "C", said point of beginning being further described as North 78°–28' East 160.00 feet from the point of beginning of said 29.31 acre parcel, and running thence from said place of beginning North 78°–28' East 500.00 feet passing thru said 29.31 acre parcel to a point at the northwest corner of access easement "B"; thence South 11°–32' East 120.00 feet passing along the common line between access easements "C" and "B", said course passing along an easterly line of said 29.31 acre parcel to a point; thence South 78°–28' West 500.00 feet passing thru said 29.31 acre parcel to a point at the common southerly corner of access easements "A" and "C"; thence North 11°–32' West 120.00 feet passing along the common line between access easements "A" and "C" to the point or place of beginning.

TOGETHER with the right, privilege and easement, in common with the Party of the First Part, its successors and assigns, and all subsequent owners of the aforementioned portions of the lands and premises retained by the Party of the First Part, to go over and upon that portion of the said lands and premises retained by the Party of the First Part and above referred to as access easement "A", for the purpose of ingress and egress by automobiles (excluding busses), to and from New York State Route 17B and the above described and aforementioned 29.31 acre parcel of land, with the specific understanding that in using said easement "A", as the same continues onto easement "C" above, such right shall terminate at the easterly boundary of said easement "C", and such automobiles shall not be permitted to continue on through the same onto easement "B" hereinabove re-

ferred to and hereinafter described; it being understood that the rights of the Party of the First Part over the said easement "A" shall not be limited in any manner whatever, which said easement "A" is more particularly bounded and described as follows:

Beginning at the point of beginning of tile above described 29.31 acre parcel and running thence from said place of beginning North 78°–28' East 160.00 feet passing along the bounds of said 29.31 acre parcel to a point; thence continuing along said bounds South 11°–32' East 120.00 feet passing along the common line between access easements "A" and "C" to a point; thence South 78°–28' West 140.00 feet continuing along the bounds of said 29.31 acre parcel to a point; thence continuing said course South 78°–28' West 55.59 feet to a point; thence South 0°–48' West 449.17 feet to a point; thence South 9°–33' West 434.17 feet to a point; thence South 2°–53' West 302.86 feet to a point; thence South 4°–17' West 342.80 feet to a point on the north bounds of New York State Route 17B-State Highway No. 890; thence North 60°–34' West 50.00 feet passing along said north bounds to a concrete highway monument found; thence North 62°–30' West 245.00 feet continuing along said bounds to a point; thence leaving said bounds and running North 21°–48' East 245.57 feet to a point; thence North 17°–10' East 312.43 feet to a point; thence North 5°–05' East 960.85 feet to a point; thence North 78°–28' East 125.02 feet to the point or place of beginning.

TOGETHER with the further right, privilege and easement, in common with the Party of the First Part, its successors and assigns, and all subsequent owners of the aforementioned portions of the lands and premises retained by the Party of the First Part,

to go over and upon that portion of the said lands and premises retained by the Party of the First Part and above referred to as access easement "B", for the purpose of ingress and egress by busses, to and from New York State Route 17B and the above described and aforementioned 29.31 acre parcel of land, with the specific understanding that in using said easement "B", as the same continues onto easement "C" above, such right shall terminate at the westerly boundary of said easement "C", and such busses shall not be permitted to continue on through the same and onto easement "A" hereinabove described and referred to; it being understood that the rights of the Party of the First Part over the said easement "B" shall not be limited in any manner whatever, which said easement "B" is more particularly bounded and described as follows:

Beginning at a point at the northeast corner of access easement "C" above described, said point of beginning being North 78°–28' East 660.00 feet as measured along the north line of access easement "C" and a portion of the north line of access easement "A" from the point of beginning of the above described 29.31 acre parcel, and running thence from said place of beginning North 78°–28' East 510.64 feet passing along the bounds of said 29.31 acre parcel to a point; thence continuing said course North 78°–28' East 49.37 feet to a point; thence South 30°–00' East 803.48 .feet to a point; thence on a curve to the right having a radius of 420.00 feet for an arc length of 171.64 feet, the central angle of said arc being 23°–24'–53" the chord of said arc being defined by the course South 18°–18' East 170.45 feet; thence South 6°–35' East 378.08 feet to a point; thence on a curve to the right having a radius of 300.00 feet for an arc length of 177.12 feet, the central angle of said arc

being 33°–49'–40", the chord of said arc being defined by the course South 10°–20'West 174.56 feet; thence South 27°–15' West 1217.34 feet to a point; thence South 3°–43' East 58.31 feet to a point on the north bounds of New York State Route 17B-State Highway No. 890; thence North 62°–45' West 120.00 feet passing along said highway bounds to a point; thence leaving said bounds and running North 58°–12' East 58.31 feet to a point; thence North 27°–15' East 1217.34 feet to a point; thence on a curve to the left having a radius of 240.00 feet for an arc length of 141.70 feet, the central angle of said arc being 33°–49'–40", the chord of said arc being defined by the course North 10°–20' East 139.65 feet; thence North 6°–35' West 378.08 feet to a point; thence on a curve to the left having a radius of 360.00 feet for an arc length of 147.12 feet, the central angle of said arc being 23°–24'–53" the chord of said arc being defined by the course North 18°–18' West 146.10 feet; thence North 30°–00' West 697.00 feet to a point; thence South 78°–28' West 296.82 feet to a point; thence South 11°–32' East 170.00 feet to a point; thence South 78°–28' West 240.00 feet passing to and along the bounds of said 29.31 acre parcel to a point; thence North 11°–32' West 290.00 feet continuing along the bounds of said 29.31 acre parcel to and along the common line between access easements "B" and "C" to the point or place of beginning.

RESERVING unto the Party of the First Part the right and privilege of constructing, re-constructing, maintaining and repairing utility lines, including, but not limited to, water, sewer, telephone, electrical, gas storm drainage and telephone lines, of all kinds, under, over and upon the above described and aforementioned 29.31 acre parcel of land, for the use and

benefit of the aforementioned lands and premises retained by the Party of the First Part.

TOGETHER with the right and privilege of constructing, re-constructing, maintaining and repairing utility lines, including, but not limited to, water, sewer, telephone, electrical, gas, storm drainage and telephone lines, of all kinds, under, over and upon that portion of the aforementioned lands and premises retained by the Party of the First Part, at such locations as shall be reasonably approved by the Party of the First Part for the use and benefit of the above described and aforementioned 29.31 acre parcel of land.

SCHEDULE 1

Seller's Deliveries

1. Warranty Deed.
2. Certification of Representations and Warranties.
3. Real Estate Transfer Forms.
4. Title Insurance Commitment.

SCHEDULE 2

Purchaser's Deliveries

1. Certification of Representations and Warranties.
2. Opinion Letter of Hobbs, Straus, Dean & Walker.
3. Real Estate Transfer Forms.

APPENDIX R

[Logo]

July 30, 2001

President Bruce Gonzales
Delaware Tribe of Oklahoma
PO Box 825
Anadarko, OK 73005

Dear Mr. Gonzales:

The Region V Chief requested that we determine whether the proposed Biscuit Hill site qualifies as Indian lands for gaming purposes under the Indian Gaming Regulatory Act. While there may be circumstances of which we are unaware, our preliminary view is that the lands do not presently constitute Indian lands for purposes of conducting gaming.

The Delaware Tribe is a federally recognized Indian tribe located within the State of Oklahoma. It proposes to game on lands described as follows:

> A tract of land beginning 1281.07 feet South and 44.8 feet West of the Northeast corner of the Southwest quarter (NE/[approximately 3 letters illegible on warranty deed]/4) of Section TEN (10). Township TWELVE (12) North, Range ELEVEN (11) West of the Indian Meridian, Caddo County, Thence West 300 feet; Thence South 300 feet; Thence East 300 feet; Thence North 300 feet to the point of beginning.

This tract of land was the subject of a June 11, 1999, Quit Claim Deed by Biscuit Hill, Inc. in favor of the Tribe. On the same date, Biscuit Hill conveyed the tract to the Tribe by Warranty Deed. There is no restriction against alienation described on either deed.

In a June 6, 2001, memorandum from Cory Aronovitz to Rainmaker Development LLC, Mr. Aronovitz indicated the Biscuit Hill property fell within the Indian Gaming Regulatory Act provision that "such lands are located in Oklahoma and—(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or (ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma . . . ."

In a June 8, 2001, memorandum from Cory Aronovitz to Rainmaker Development LLC, Mr. Aronovitz stated that the Biscuit Hill property "has been removed from the State tax-roll, placing the property in a restricted status. Restricted land status in Oklahoma may conduct gaming pursuant to IGRA, Section 2719 (see previous memorandum) (sic). Therefore, the Biscuit Hill property may commence Class II gaming." There is no documentation or analysis in either of Mr. Aronovitz's memoranda supporting these conclusions.

In a June 26, 2001, letter from Vernon Crumm, Caddo County Assessor, to the Tribe, Mr. Crumm stated that this "property was made non-taxable when transferred to the tribe. Hinton 10-11-N-11W Biscuit Hill." In a July 30, 2001, telephone conversation with Penny J. Coleman, Deputy General Counsel, Mr. Crumm informed Ms Coleman that the County does not differentiate between fee and trust lands and that the County simply takes land off the tax roll as soon as it is transferred to a tribe, regardless of the land status.

Mr. Kirke Kickingbird, tribal attorney, indicates that the land has not been acquired in trust or otherwise by the United States on behalf of the Tribe. Therefore

these lands are not trust lands and do not appear to be restricted against alienation by the United States as required by 25 U.S.C. § 2703(4)(B) (definition of Indian lands). Consequently, we do not believe that these lands constitute Indian lands under the Indian Gaming Regulatory Act.

Sincerely,

/s/ Penny J.Coleman
PENNY J. COLEMAN
Deputy General Counsel

cc: Chief, Region V
Director, DOE
K Kickingbird

APPENDIX S

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 00 CIV 8660 (CM)

CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., and MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C.,
Plaintiffs,

v.

PARK PLACE ENTERTAINMENT CORPORATION,
Defendant.

STATE OF NEW YORK)
ss.:
COUNTY OF ONONDAGA)

JOHN F. O'MARA, being duly sworn, says:

1. I am a member of the Bar of the State of New York, My business address is Davidson & O'Mara, P.C., 243 Lake Street, Elmira, New York 14901-3192.

2. During the year 2000, I was the principal negotiator for Governor George Pataki on Indian land claims and an advisor to Governor Pataki on matters relating to Indian gaming in the State of New York.

3. During the course of my duties for the Governor, I had occasion to become familiar with a proposed casino project at Monticello Raceway in the Catskills which I understood was being developed by one or more of the Plaintiffs in the above captioned case and the St. Regis Mohawk Tribe (the "Tribe").

4. I had conversations about the project with Robert Berman, who I understood was representing one or more of the Plaintiffs, as well as with leaders and representatives of the Tribe.

5. In April 2000, I became aware that the United States Department of the Interior (the "DOI") had determined that a gaming establishment on a parcel of land at the Monticello Raceway would be in the best interests of the Tribe and its members and not detrimental to the surrounding community.

6. By letter dated April 6, 20611, the DOI sought the concurrence of the Governor in this determination, which concurrence would permit the Monticello Raceway land to be taken into trust.

7. Governor Pataki has been a supporter of Indian gaming as part of an effort to revitalize the Catskill region.

8. It is my view, based on the Governor's views on the subject, that the Governor was favorably disposed toward the Monticello Raceway project. I was optimistic that once the Tribe and the State agreed on the terms of a gaining compact that would govern the Monticello Raceway casino, and if the Tribe and the State could resolve the Tribe's pending land claims against the State, which was under discussion at the time, the Governor would concur with the DOT's determination and the Monticello project could proceed.

9. Before these events occurred, however, I was informed that the Tribe had ended its relationship with the Plaintiffs and had decided to pursue a casino project in the Catskills with Park Place Entertainment, the Defendant in this case. As a result, the Governor's office put the matter on hold indefinitely

until the situation could be clarified. To date that has not occurred,

10. At no time did I indicate to anyone that the project at Monticello Raceway would not be approved by the State without the participation of Park Place Entertainment.

/s/ John F. O'Mara
JOHN F. O'MARA

Sworn to and subscribed before me this 23rd day of May, 2002.

/s/ Jan R. Farr
JAN R. FARR

APPENDIX T

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action File
No. 00 CIV 8660 (CM)

AFFADAVIT OF
PATRICK L. KEHOE

CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., AND MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C.,
Plaintiffs,

v.

PARK PLACE ENTERTAINMENT CORPORATION,
Defendant,

STATE OF NEW YORK)
ss.:
COUNTY OF ONONDAGA)

PATRICK L. KEHOE, being duly sworn, says:

1. I am a member of the Bar of the State of New York, My business address is Executive Chamber, Albany, New York.

2. I am presently a Senior Assistant Counsel to Governor PATAKI and I occupied the same position during the year 2000.

3. Part of my duties during the year 2000 up to the present have been to advise the Governor on matters pertaining to Indian gaming in the State of New York.

4. During the course of my duties for the Governor, I had occasion to become familiar with a

proposed casino project at Monticello Raceway in the Catskills which I understood was being developed by some or all of the Plaintiffs in this case and the St. Regis Mohawk Tribe (the "Tribe"),

5. In mid-April, 2000, I received a call from Clive Cummis, who I understood was counsel for Park Place Entertainment, the Defendant in this action, who asked to meet with me, MT. Cummis stated that he was requesting a meeting to introduce himself and his company. I met with Mr. Cummis in New York City. During our meeting we engaged in general discussion about Indian gaming in New York and about the consulting agreement for the akwesasne Casino that Mr. Cummis said had been recently signed.

6. At no time during the meeting with Mr. Cummis did I state to him in words or substance that the Governor would not approve the Plaintiff's project at Monticello Raceway without the involvement or participation of Park Place Entertainment.

/s/ Patrick L. Kehoe
Patrick L. Kehoe

Sworn to and subscribed before me
this 23rd day of May, 2002.

/s/ Jan R. Farr
Notary Public

APPENDIX U

[LOGO]

NATIONAL HEADQUARTERS
1441 L Street NW, Suite 9100, Washington, DC 200050
Tel: 202 632 7003 Fax: 202 632 7066

April 11, 2002

Mr. James M. Wilson
Reed Smith
529 Fifth Avenue, Eighth Floor
New York, NY 10017-4608

Re: Request for the testimony of Fred Stuckwisch and Elaine Trimble

Dear Mr. Wilson:

On April 10, 2002, during the noon hour, subpoenas were served on NIGC employees Fred Stuckwisch and Elaine Trimble. We also received, by overnight mail on the same day, a copy of your Touhy request letter, dated April 9, 2002. The purpose of this letter is to address your request for the testimony of Mr. Stuckwisch and Ms. Trimble.

Our "Touhy" regulations, set forth at 25 C.F.R. 516, require us to consider whether such testimony would be in the public interest. In making this determination, we may consider whether allowing the statement or testimony would serve the goals of the regulation, whether allowing the statement or testimony is necessary to prevent a miscarriage of justice, and whether the Commission or the United States has any important interests which may be affected by the outcome of the legal proceeding, as well as any other factors that seem important or relevant.

After considering your letter, the complaint in the case, the verified statement of Herbert F. Kozlov, and the Commission's regulations, we have concluded that it would not be in the public interest for either Mr. Stuckwisch or Ms. Trimble to testify on the matter that you discussed. First, let me note that the Commission has sought to be helpful in a general manner. I understand that on December 28, 2001, the identified Commission staff met informally with plaintiffs' counsel, including Michael Cox, John Gallagher and Tom Paccio, to discuss generally the management contract review process at the Commission. In other words, the Commission has already attempted to assist in providing the relevant background information necessary to assist you in understanding the manner in which the agency conducts the management contract review process.

Beyond our attempts to assist you and other members of the public to understand our process and procedures, we are not inclined to allow staff members to be subjected to examination on the specific meeting that you discuss because we believe that it would not be in the public interest. First, any such examination is likely to intrude into the agency's internal deliberative process. As you are aware, no decision was made on the management contract at issue. The Chairman, who makes such decisions, was never asked to make a decision in this case because the management contract review process was not completed. Indeed, discussion in any forum on the question of whether or not the contract might or might not have been approved would involve only raw speculation.

Second, we have also considered carefully whether our refusal to offer testimony might result in a mis-

carriage of justice. For several reasons, we do not believe that Commission testimony is necessary to prevent a miscarriage of justice. The description of the February 2000 meeting that is set forth in the deposition seems highly equivocal. It is not likely that our testimony would provide substantial additional clarity. Commission staff frequently works with parties to identify and address contract deficiencies with tribal officials and management contractors. The conversation that is described in the Ransom Deposition (Kozlov Verified Statement, Para. 7), resembles conversations that frequently occur in these offices between the Commission and parties to management contracts. It is not unusual for management contracts to have deficiencies, especially when first submitted. Indeed, Commission staff is unaware of any contract in recent memory in which a management contract was sufficient upon submission. The review of a management contract is an iterative process in which the staff identifies deficiencies and requests submission of additional information or material from the parties. It is only when the staff reaches the point that all available information has been received (or the parties have refused to make additional submissions) and the parties have addressed all of the issues identified by the staff (or have refused to address such issues) that a contract is submitted to the Chairman for his action. The absence of action by the Chairman on the contract at issue in this case is a clear indicator that the staff had not completed its work.

Based on our review, it is not in the public interest identified staff to provide testimony in this case and your request for such testimony is denied. If you have any other questions, please do not hesitate to contact me. Thank you for your cooperation.

Very truly yours,

/s/ Kevin K. Washburn
KEVIN K. WASHBURN
General Counsel

APPENDIX V

Gaming Law Review
December, 2004

Original Paper

THE MECHANICS OF INDIAN GAMING MANAGEMENT CONTRACT APPROVAL

Kevin K. Washburn*

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IN THE INDIAN GAMING REGULATORY ACT, Congress took from the Secretary of the Interior and vested with the National Indian Gaming Commission (NIGC) the responsibility to review and approve gaming management agreements between tribes and outside contractors.[1] Congress intended to insure through this process, first, that Indian tribes (rather than outside parties) are the primary beneficiaries of Indian gaming and, second, that Indian gaming is shielded from organized crime and other corrupting

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* Kevin K. Washburn is Associate Professor at the University of Minnesota Law School. He is a former federal prosecutor, a former trial attorney at the United States Department of Justice, and was the General Counsel at the National Indian Gaming Commission in Washington, D.C., from January 2000 to July 2002. During his tenure as General Counsel, he reviewed thirty to forty management contracts or amendments at various stages of the review process, during which time the NIGC Chairman approved eight such contracts. Only five contracts have been approved during the more than two years since his departure. This is a reflection of the complexity of the management contract approval process. He appreciates the comments of NIGC officials Penny Coleman, Fred Stuckwisch, and Elaine Trimble on an earlier draft of this article

[1] *See* 25 U.S.C. § 2711(h).

influences.[2] The Indian Gaming Regulatory Act (IGRA) and NIGC regulations set forth extensive requirements for submission and approval of gaming management contracts between Indian tribes and outside management contractors.

While the NIGC has provided occasional guidance[3] and commentators have occasionally discussed some aspects of the process,[4] this article is an effort to explain the nuts and bolts of the approval process in a deliberate, comprehensive and step-by-step manner. The first section explains the process from a practical viewpoint. The next section describes the substantive standards in greater depth and explains how they are practically applied by the NIGC. The final section explains how collateral agreements are relevant in this process.

FUNCTIONAL OVERVIEW OF THE MANAGEMENT CONTRACT REVIEW PROCESS

In the thirteen years that the NIGC has been in existence, the Commission has approved approximately forty-three gaming management contracts.[5] The NIGC has also approved numerous contract

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[2] *See* 25 U.S.C. § 2702 (Declaration of Congressional Policy).

[3] NIGC guidance is available on the NIGC Web site at <http://www.nigc.gov>.

[4] *See, e.g.*, Heidi McNeil Staudenmaier, *Negotiating Enforceable Tribal Gaming Management Agreements*, 7 GAMING L. REV. 31 (2003).

[5] Although the NIGC was authorized by statute in 1988, the first Chairman was not appointed until 1990. A list of the approved gaming management contracts is available on the NIGC Web site, <http://www.nigc.gov>. According to the list, the first NIGC management contract approval was issued on October 4, 1993, and the most recent was issued on July 19, 2004.

modifications, amendments, and extensions.[6] It has reviewed countless other contracts that were never approved for various reasons. The management contract review process at the NIGC is now routine. It proceeds roughly as follows.

The management contract review process begins when the parties submit a signed management contract for review. The time for NIGC review varies with the complexity of the management contract, the level of cooperation from the parties, and the scope of any necessary background investigations and environmental review.

Under the applicable regulations, the Chairman has only 180 days to review, and then approve or disapprove, a management contract.[7] As a practical matter, this time limit is not a day-to-day concern for the NIGC. First, the Chairman may extend the deadline for 90 days at will as long as he notifies the parties that he is doing so.[8] Second, the parties' primary means of enforcing the 180 day review requirement is an action in federal court to compel a decision by the Chairman.[9] Obtaining judicial relief is likely to take a long time and might be met with hostility by Commission staff. Accordingly, parties regularly address NIGC delays with patience and cooperation. Finally, the NIGC has interpreted the law to mean that the 180-day time period does not begin

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[6] Management contracts for Indian gaming are not valid unless approved by the Chairman of the NIGC. Modifications of approved gaming management contracts, such as extensions, must also be approved. *See* 25 C.F.R. § 535.1.

[7] *See* 25 C.F.R. § 533.4(a)

[8] *See id.*

[9] *See* 25 U.S.C. § 2711(d).

to run until the NIGC receives a "complete submission."[10] Because the NIGC staff will often require the parties to modify the contract and resubmit it, the clock usually is restarted at least once after initial submission.

Though the NIGC staff works diligently to process management contracts, the NIGC staff routinely advises parties that the contract review process takes from six to eighteen months.[11] In recent years, the time required for approval has sometimes stretched out more than eighteen months, largely due to environmental compliance issues, which will be discussed more below, and issues related to Indian land acquisitions. Though some contract modifications or extensions are approved in as little as six months, it is probably more prudent to estimate twelve to thirty-six months from submission to approval for an entirely new contract. While environmental review and background investigations may occasionally cause delay, a common reason for delay is lack of cooperation or sophistication by parties to management contracts and lack of responsiveness to NIGC concerns.

Submission of a management contract begins what might best be described as a negotiation process in which the NIGC asks the parties to modify or explain

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[10] 25 C.F.R. §§ 533.4(a), 533.6.

[11] According to official NIGC publications, "the review is comprehensive; the length and amount of time it takes is dependent upon several factors including the completeness of each submission, the responsiveness of the parties, the degree to which the submission meets the requirements of the law, and the Commission's backlog." *See* Helpful Hints for Submitting a Management Contract And Obtaining the Chairman's Approval, a guidance memorandum available on the NIGC Web site at <http://www.nigc.gov>.

the contract to address issues of concern to the NIGC. Management contracts are shepherded through the NIGC review process primarily by financial analysts in the Contracts Division with guidance from attorneys in the Office of General Counsel. The review process involves substantial communication back and forth between NIGC staff and the parties, usually in a series of written communications and meetings.

In the history of the NIGC, probably no gaming management contract has ever been approved as submitted. The NIGC staff routinely raises dozens of questions and concerns and almost always requires the parties to amend the management contract, or at least provide additional clarification or justification for specific terms. Many of the changes sought by the NIGC are insignificant from the perspective of the parties. On the other hand, some of the changes may be material and, in extraordinary cases, the parties may be asked to renegotiate certain provisions, including such key terms as compensation and duration of the contract.

Frequently, the parties anticipate further negotiation and modification of the contract after it is submitted to the NIGC. The NIGC will not review a contract until it has been signed by the parties.[12] Because management contracts are processed on a first come, first served basis, parties interested in obtaining financing and beginning casino construction have a strong incentive to submit contracts at the earliest possible moment to begin the NIGC process and to secure a place in the NIGC queue.[13] Submission can

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[12] *See* 25 C.F.R. §§ 533.2, 533.3(a)(1).

[13] *See* Helpful Hints for Submitting a Management Contract and Obtaining the Chairman's Approval," a guidance memo-

also bring NIGC expertise to bear on the drafting process and serve to initiate other important but time-consuming NIGC processes, such as environmental review and background investigations. Thus, the typical management contract submitted to the NIGC, though signed, may be intended primarily as an initial draft with the understanding that the parties will amend the contract as needed to obtain NIGC approval and possibly to address other matters of concern between the parties. Management contracts and collateral agreements often contain blanks or even typographical errors.

Following the initial submission of a gaming management contract, the NIGC Contracts Division usually responds with a letter detailing submission deficiencies, that is, an explanation of errors in submission and a list of additional information that must be submitted before formal contract review will begin.

Initial review

Once the parties provide sufficient information for the NIGC staff to begin its review, NIGC staff in the Contracts Division will review the management contract submission and prepare an initial review memorandum setting forth potential problems and concerns and any remaining submission and content deficiencies. The memorandum prepared by NIGC staff at this stage typically will include the following information, among other things:

a. a summary of any involvement thus far by the NIGC, including the date the contract was

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randum available on the NIGC Web site at <http://www.nigc.gov> (noting that NIGC processes management contracts on "a first-in first-out basis").

submitted, and any actions taken since submission such as summaries of meetings between the parties; b. a summary of the scope of the project, including general information, such as the square footage of the proposed casino, the type of gaming that may be involved, the names of the parties, and the estimated level of investment in the proposed casino (usually in the multiple millions of dollars); c. a summary of the proposed terms of the management contract; d. a justification for extraordinary terms (if the contract calls for a term in excess of five years or a fee in excess of thirty percent of gaming revenues); e. a summary of any collateral agreements and a description of their purposes; f. a summary of the status of any background investigations that lists the names of persons subject to investigation; g. a summary of the status of any environmental review; h. a description as to the status of the determination of whether the proposed project is on Indian lands; i. a statement as to whether there is an approved tribal gaming ordinance and the status of NIGC review of any proposed ordinance and/or the date the ordinance was approved by the NIGC; j. for Class III management contracts, a confirmation that the tribe has an approved tribal-state compact for Class III gaming and the date of approval; k. a lengthy list of issues and concerns that includes submission deficiencies, content deficiencies, and general concerns about the specific terms of the contract; and l. a recommendation by NIGC staff to the General Counsel and the Director of Contracts as to the proposed course of action, which at this stage usually involves a recommendation that the NIGC staff forward a letter to the parties de-

tailing the problems and perhaps invites the parties to have a meeting with the parties and NIGC staff to go over problem areas. The initial review memorandum prepared by NIGC staff is usually meticulous; it will frequently include an exhaustive list of twenty to as many as eighty or more deficiencies of the contract or concerns as to which the NIGC needs additional information.

While this "deficiency rate" may seem surprisingly high, the parties to a management contract tend to focus their attention at the initial drafting stages on the relationship between themselves and not on the regulatory compliance issues. In addition, management contracts involving the development of turnkey casinos often involve one or more highly complicated financial arrangements. Together with supporting documents and collateral agreements, the documents that must be reviewed often constitute hundreds of pages and may ultimately consist of several inches of paper.

The initial review memorandum, which summarizes the management agreement and addresses all the issues listed above, must be reviewed by a staff attorney in the Office of General Counsel and must be signed as "approved" by the General Counsel and the Director of the Contracts Division. This memo then serves as the basis for an initial deficiency letter to the parties, which will usually be prepared and signed by a financial analyst in the NIGC Contracts Division. The initial deficiency letter to the parties, a file copy of which must be surnamed (or initialed) by the Director of the Contracts Division and the General Counsel prior to its transmittal, identifies the numerous NIGC questions and concerns (usually setting forth the list noted in item k above), seeks addi-

tional information, and will often explain modifications to the contract documents that the NIGC will require.

Follow through and subsequent review

After the parties receive the initial deficiency letter, the parties will work to gather the new information and redraft and execute a new contract, if necessary, and then submit updated documents to the NIGC. When the additional information and, if necessary, a new version of the contract is submitted by the parties, the entire process repeats, with NIGC staff reviewing the information and creating another memorandum and a new deficiency letter to the parties.

In most cases, in the second review memorandum and deficiency letter to the parties, the section listing questions and concerns is somewhat shorter overall because the parties have addressed many of the NIGC staff's initial concerns.[14] Nevertheless, the process often requires two to three more communications between the NIGC and the parties before the contract is ready to be approved by the NIGC staff. Often, the parties will meet with NIGC staff during this process to vent frustration, to seek NIGC guidance, or to explain issues or financial arrangements that the parties believe that the NIGC staff does not fully understand.

Because the NIGC interprets the Indian Gaming Regulatory Act as vesting with the NIGC the respon-

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[14] By the time the management contract is ready for presentation to the Chairman for approval many months later, the file will usually contain several such memoranda prepared at various stages of contract review, showing the evolution of that particular management contract review.

sibility to insure that such contracts are "fair" to Indian tribes,[15] the NIGC sometimes inserts itself into contract negotiations in an attempt to insure that the tribe obtains the maximum advantage from the gaming project. During discussions, the NIGC staff will sometimes meet with the tribe and its attorneys apart from the management contractor to discuss particular NIGC concerns and to insure that the NIGC can obtain the tribe's frank view of the contract outside the presence of the manager. Because a contract is void absent NIGC approval, [16] the NIGC has tremendous informal authority at the pre-approval stage; each of the parties is usually strongly motivated to satisfy the concerns of NIGC staff, so that they can break ground on the project, even in circumstances when they believe that the NIGC is acting beyond the scope of its authority.

Approval or disapproval

The principal decision maker at the NIGC is the Chairman. The entirety of the review process, including the discussions with the parties, is directed toward compliance with NIGC requirements so that the NIGC staff can recommend that the Chairman approve the management contract. The Chairman may disapprove a management agreement for a variety of reasons related to gaming regulatory concerns that are set forth in the regulations.[17]

In addition, the Chairman must disapprove a management contract if he determines that a theoretical trustee for the tribe, acting with the prudence and

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[15] *See* 25 U.S.C. § 2711(e)(4).

[16] *See* 25 C.F.R. § 533.7

[17] *See* 25 C.F.R. § 533.6(b) and (c).

diligence normally required of a trustee, would not approve the contract.[18] This provision gives the Chairman the apparent discretionary power to second-guess business decisions by the tribe. However, because such action would not be consistent with current federal policies of treating tribes as self-governing sovereigns, disapproval on the basis of the trust responsibility is highly unusual. Though this "trust responsibility" therefore gives the NIGC staff some leverage to extract concessions from the management contractor, it does not, in practice, result in disapprovals of management contracts.

Rarely has a management contract been disapproved by the Chairman. Disapprovals are likely to occur where the parties lack sophistication to provide adequate "follow through" to complete the project approval process.[19] If a contract is likely to be disapproved, members of the NIGC staff will communicate their concerns to the parties and encourage the parties to modify the contract to satisfy NIGC staff concerns or to withdraw the contract from NIGC review.

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[18] *See* 25 C.F.R. § 533.6(b). Because this authority extends only to Class II contracts, the NIGC staff has maximum leverage with management contracts that include Class II gaming. Because many managers wish to keep their gaming options open, many contracts include Class II gaming, even if they are principally geared toward the more profitable Class III gaming.

[19] The Chairman disapproved a management contract between First Nation Gaming, LLC, and the San Pasqual Band of Mission Indians on October 16, 2001, for failure to meet repeated requests for additional information from the Commission staff. Although the parties appealed the Chairman's disapproval to the entire Commission, the appeal was unsuccessful. The Commission ruled, under 25 C.F.R. § 533.6(b)(1)(iv), that the refusal to provide additional information was tantamount to a refusal to respond to questions asked by the Chairman.

Management contractors have a strong incentive to withdraw, rather than risk disapproval; disapproval by the NIGC may harm the party's reputation in the gaming industry and may have significant ramifications as to regulatory approvals with regard to other gaming jurisdictions. Moreover, although the parties have a right of appeal of a disapproval decision by the Chairman,[20] parties are not likely to be willing to undergo the lengthy appeal process and the related opportunity costs, particularly in light of the unlikely result of prevailing on appeal.

SUBSTANTIVE OVERVIEW OF THE MANAGEMENT CONTRACT REVIEW PROCESS

During the course of the management contract review, the NIGC must ascertain whether the tribe has an approved Class III tribal-state gaming compact in place if the tribe is seeking to conduct Class III gaming;[21] that the tribe has an approved tribal gaming ordinance;[22] and that the lands upon which the facility is or will be located constitute "Indian lands" as that term is defined in IGRA and NIGC regulations.[23] However, the substantive components of the management contract review process involve three main areas: legal and financial review of the contract terms, background investigations of certain individuals, and environmental compliance. This section will discuss each of these broad areas in that order.

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[20] *See* 25 C.F.R. § 539

[21] *See* 25 U.S.C. § 2710(d)(1)(C).

[22] *See* 25 U.S.C. §§ 2710(b)(1) and (d)(1).

[23] *See* 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12.

Review of the terms of the gaming management agreement

The heart of the review process is review of the substantive management contract provisions against the specific substantive requirements set forth in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710(d)(9) and 2711, and the NIGC's regulations, primarily 25 C.F.R. §§ 531 and 533. These regulations detail the requirements for submission of a management contract to the NIGC (called "submission requirements" by the NIGC staff)[24] and also detail the substantive content provisions that are required[25] and that are prohibited[26] in management contracts (collectively referred to by the NIGC staff as "content requirements").[27]

To meet the submission requirements, a management contract must be submitted with, first, original signatures of authorized officials of both parties;[28] second, with a representation that the contract is the entirety of the agreement among the parties;[29] third, with a letter signed by the tribal chairman setting out the authority of the tribal signatory to act for the tribe, together with documents providing evidence of such authority.[30] In addition, the parties must sub-

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[24] 25 C.F.R. § 533. The NIGC checklist for new management contracts, available on the NIGC Web site, is helpful in examining these requirements.

[25]. 25 C.F.R. § 531.1.

[26] 25 C.F.R. § 531.2.

[27] 25 C.F.R. §§ 533.1(h) and (i).

[28] *See* 25 C.F.R. § 533.3(a)(1).

[29] *See* 25 C.F.R. § 533.3(a)(2).

[30] *See* 25 C.F.R. § 533.3(b) and (c).

mit, fourth, a list of persons and identities subject to the background investigation requirements[31] and, fifth, a three-year business plan setting forth the parties' goals, objectives, budgets, and financial plans.[32] Sixth and last, the parties must submit a justification for any length of contract term in excess of the standard limit of five years or any provision for compensation in excess of the standard limit of thirty percent of net gaming revenues.[33] If the submission requirements are met, the management contract must also meet numerous content requirements.

Length of term and compensation requirements. Perhaps the most noteworthy content requirement is the compensation and length of term limitations just mentioned. Under IGRA and NIGC regulations, a management contract generally may not be approved for a term exceeding five years, or for compensation in excess of thirty percent of net gaming revenues, absent extraordinary circumstances.[34] The Chairman may approve a management contract term length in excess of five years (to a maximum term of seven years), or with a compensation term in excess of 30 percent of net gaming revenues (to a maximum of 40 percent), only if the Chairman is "satisfied that the capital investment required, and the income projections, for the gaming operation, require the additional time," or "the additional fee."[35]

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[31] *See* 25 C.F.R. § 533.3(d). For greater detail, *see also* 25 C.F.R. § 537.1(b).

[32] *See* 25 C.F.R. § 533.3(e).

[33] *See* 25 C.F.R. §§ 533.3(f), 531(f).

[34] *See* 25 U.S.C. § 2711(b)(5) and (c)(2); 25 C.F.R. § 531.1(h) and (i).

[35] *Id*

Neither IGRA nor the regulations provide further guidance as to what standards should be used to determine whether additional time or an additional fee is "required." The failure to define this term causes great difficulty and, frankly, great uncertainty in the management contract approval process. However, some rules of thumb have developed that are helpful in considering this question. First, because a management contract requires no justification if it is for no more than five years and calls for a management fee of no more than 30 percent of net gaming revenues, the NIGC generally considers the five year term and 30 percent management fee as both a safe harbor and a benchmark for comparison of any contract with terms in excess of the safe harbors. To establish a benchmark for review, the NIGC will routinely require financial projections for a hypothetical contract that would possess the 30 percent/five year safe harbor and that is otherwise ceteris paribus. The NIGC would then compare these financial projections to the projections for the contract under review. If the NIGC is able to determine that the contract under review to the tribe is more favorable to the tribe, the NIGC staff is likely to determine that the compensation term is "required" by the circumstances and recommend approval of the contract. Such circumstances may occur for example if the parties seek a length of term of six years, but call for compensation equal only to 25 percent of net gaming revenue.

In cases in which this method does not provide a definitive answer, the NIGC staff will consider a variety of ultimately uncertain variables including evidence that the project presents substantial risk to the management contractor, or that substantial revenues are not likely to exist in the early years, due to start up costs such as financing, marketing, training, and

construction. Given the magnitude of costs in large projects, trying to pay all of these costs during a five-year term can impose serious burdens on a tribe, with the result that the tribe sees little or no revenue in the early years of a management contract. The tribe may very well wish to receive more revenue during the early years when the costs of repaying construction and startup costs are far greater as a percentage of overall revenue. If a contract calls for the term to be lengthened so that the tribe receives greater benefit in the early years, the NIGC staff may look more favorably on the excess terms, particularly if the agreement offers the tribe substantially greater revenue in the short term. Because many recent projects have involved construction costs in excess of $100 million, it is not unusual for parties to submit, and the NIGC to approve, management contracts with terms in excess of the safe harbors of five years/30 percent.

If the NIGC fails to find the excess terms justified, however, then NIGC staff generally will encourage the parties to redraft the contract. One imperfect manner in which parties can meet the term requirement is to redraft a contract for a five-year term with an option for a two-year extension with consent of both parties.

Other management contract "content" requirements. In addition to the compensation and length of term requirements, IGRA and/or NIGC regulations contain fourteen additional general content requirements, several of which are broken down into great detail or subparts.[36] In general, these relate to delineation of responsibilities of the parties, insuring

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[36] *See* 25 C.F.R. § 531.1(a)-(n).

proper accounting, insuring that information is shared freely with the tribe, providing certain financial benefits to the tribe (and clarifying maximum liabilities for certain expenses), clarifying and limiting certain aspects of the relationship, such as ownership, sub-contracting, the grounds and mechanisms for modifying or terminating the contract, and insuring clarity as to when the contract is effective.

a. Legality. The management contract must explicitly provide that all gaming conducted under the management contract will be conducted in accordance with IGRA and the tribal gaming ordinance.[37]

b. Assignment of Responsibilities. The management contract must explicitly assign responsibility for sixteen identified functions to the tribe or the contractor.[38] The functions include: 1) maintenance and improvements, 2) provision of operating capital, 3) establishment of operating days and hours, 4) employee management, 5) maintenance of books and records, 6) preparation of financial statements and reports, 7) provision of an independent auditor, 8) security personnel management, 9) provision of fire protection services, 10) marketing, 11) payment of bills and expenses, 12) establishment of employment practices, 13) provision of insurance, 14) compliance with Internal Revenue Code, 15) allocation of cost of increased public safety services, and 16) environmental compliance.

With some exceptions,[39] the NIGC generally does not express any preference as to which party accepts

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[37] *See* 25 C.F.R. § 531.1(a).

[38] *See* 25 C.F.R. 531.1(b)(1)-(16).

[39] For example, as to item seven (provision of an independent auditor), the NIGC regulations require the tribe to hire the in-

each of these responsibilities. These provisions are designed to force the parties to address issues that might not otherwise be addressed and presumably to give government authorities a clearly responsible target if the public responsibilities of the enterprise, including providing for public safety, are not met. For example, the requirement in item fourteen of assigning who is responsible for compliance with the Internal Revenue Code works, as a practical matter, to assign culpability so as to give the Internal Revenue Service a clear target in the case of illegal tax avoidance or fraud; it prevents one party from using ambiguity in the contract to deny liability by claiming that it was the responsibility of the other party.

c. Accounting. Another important content requirement relates to accounting. Under NIGC regulations, a management contract must explicitly provide for the establishment of satisfactory accounting systems and procedures that include an adequate system of internal accounting controls, permit the preparation of financial statements in accordance with generally-accepted accounting principles, are susceptible to audit, allow the calculation of fees, permit the calculation and payment of a manager's fee, and provide for the allocation of operating expenses or overhead expenses among the tribe, the gaming operation, the contractor, and any other use of shared facilities and services.[40] These requirements serve many of the same functions as the requirements discussed above by making one party clearly responsible to government authorities. However, they also serve the pur-

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dependent auditor. A management contract may, however, limit the choices the tribe faces, such as designating a "nationally recognized firm."

[40] *See* 25 C.F.R. §§ 531.1(c)(1)-(5).

pose of insuring that the books are suitable for audit. This provision works hand-in-glove with the NIGC's annual independent audit requirements[41] that are imposed on Indian gaming operations; the independent audit requirement makes many of the NIGC financial concerns self-enforcing by requiring the enterprise to satisfy an independent auditor who will produce a report that will be submitted to the NIGC. However, the annual independent audit requirement also creates some complications for management contracts. The NIGC routinely asks the parties to define the gaming operation in the contract in a manner that maintains clarity and appropriate separation in the independent audit and financial reports. For example, some management contracts are for activities in addition to gaming, such as gifts, concessions, restaurants, resorts, hotels, convention and meeting facilities, parking, and other activities. Inclusion of non-gaming activities in the definition of the gaming operation can therefore obfuscate or distort gaming revenue figures in the audit. The NIGC frequently addresses this issue at the initial review stage.

d. Information-sharing and Access. The content requirements also include provisions related to information-sharing and access. First, the contract must explicitly require the management contractor to provide verifiable financial reports, or the information necessary to prepare such reports, to the tribal governing body not less frequently than monthly.[42] Second, the management contract must explicitly re-

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[41] *See* 25 C.F.R. §§ 522(b)(3), 522.6(b), 571.12. *See also* NIGC Bulletin 97-2, Audit Requirements for Gaming Operations, available on the NIGC Web site at <http://www.nigc.gov/nigc/documents/bulletins/NIGC-97-2.jsp>.

[42] *See* 25 C.F.R. § 531.1(d).

quire the management contractor to provide immediate access to the gaming operation, including its books and records, by appropriate tribal officials, who shall have the right to verify daily gross revenues and income and access to any gaming related information the tribe deems appropriate.[43]

e. Development & Construction Costs and Termination. The management contract must provide for a minimum guaranteed monthly payment to the tribe in a sum certain that has priority over the retirement of development and construction costs.[44] It must also provide an agreed maximum recoupment for development and construction costs.[45] It must also provide the grounds and mechanisms for modifying or terminating the contract.[46]

f. Dispute Resolution. The content requirements also address dispute resolution. The management contract must contain a mechanism for resolving three kinds of disputes that might arise in relation to the gaming operation: disputes between the manager and the customers, disputes between the manager and the tribe, and disputes between the manager and employees.[47] While most parties have carefully considered how to resolve disputes between the manager and the tribe, they often have not addressed the other two issues in the contract. The NIGC frequently notes deficiencies for failure to address manager-customer disputes and manager-employee dis-

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[43] *See* 25 C.F.R. § 531.1(e).

[44] *See* 25 C.F.R. § 531.1(f).

[45] *See* 25 C.F.R. § 531.1(g).

[46] *See* 25 C.F.R. § 531.1(j).

[47] *See* 25 C.F.R. § 531.1(k).

putes with sufficient clarity on initial submission of a contract.

Another dispute resolution problem that arises often relates to arbitration. The parties frequently select arbitration as the primary means for addressing disputes between the tribe and the manager. However, the NIGC has drawn a firm line as to which disputes are appropriate for arbitration and which are not. While the NIGC is willing to allow parties to arbitrate commercial disputes, the NIGC jealously guards the tribe's governmental authority over the regulation of the Indian gaming enterprise. Thus it routinely rejects arbitration provisions that might be interpreted to give an arbitrator the power to change governmental decisions, such as tribal licensure decisions. The NIGC frequently finds content deficiencies in this area on initial submission of a contract.

g. Assignments, Subcontracting, Changes in Ownership, and Effective Date. Under NIGC regulations, the management contract must also indicate whether and to what extent contract assignments and subcontracting are permissible[48] and whether and to what extent changes in the ownership interest in the management contract require advance approval by the tribe. Because of the need for a background investigation for any person or entity with a substantial ownership interest in the management contracting entity, the parties are, as a practical matter, often seriously constrained as to modifications of ownership. Finally, the management contract must state that the contract shall not be effective unless and until it is approved by the NIGC Chairman.[49]

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[48] *See* 25 C.F.R. § 531.1(l).

[49] *See* 25 C.F.R. § 531.1(n).

h. Content Prohibitions. While the previous requirements deal primarily with affirmative content, that is, provisions that each contract must have, NIGC content requirements also have a negative component. The regulations prohibit a management contract from conveying any interest in land or other real property absent specific statutory authority and an explicit statement in the contract.[50] It is generally against federal Indian affairs policy to allow further deterioration of the Indian land base. As a result, Indian tribes have long been required to seek federal approval to convey trust land to outsiders.[51] The purpose of this provision is thus to prevent land from being conveyed from the Indian tribe to an outside party as part of the compensation for the management of a casino under the apparent approval of the federal government.

Background investigations

Among the most important purposes of gaming regulation in all jurisdictions is to protect this cash-intensive industry from criminal activities. The NIGC's specific mandate is to shield the Indian gaming industry from organized crime and other corrupting influences.[52] The general purpose of the background investigation is to determine whether a person or entity involved in gaming poses a threat to the integrity of the gaming industry. Because NIGC does not use a licensure process, NIGC review is somewhat different than the process in other jurisdictions.

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[50] *See* 25 C.F.R. § 531.2.

[51] *See, e.g.*, 25 U.S.C. § 81

[52] *See* Section 3 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2702.

When the NIGC begins review of the contract terms, NIGC staff will usually perform some level of background investigation. The background investigation requirements are different for Class II and Class III gaming and, perhaps ironically, are more extensive for Class II gaming (bingo and related games) than Class III gaming (all other commercial gaming, such as slot machines, blackjack, and roulette).[53] For management contracts providing for both Class II and Class III gaming, the NIGC must use the more extensive Class II procedures. This likely causes some contractors to limit the management contract to Class III gaming. The requirements are set forth below.

For management contracts involving Class II gaming, the NIGC must conduct a background investigation of the following persons: each person or entity that is a party to a management contract and each person who has management responsibility for the management contract, each person who is a director of a corporation that is a party to the management contract, the ten persons who have the greatest financial interest in a management contract, any business entity with a financial interest in the contract, and any other person with a financial interest whom the Chairman wishes to investigate.[54] As

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[53] Though, at first glance, it is surprising that the NIGC has a greater responsibility for background investigations of Class II gaming (bingo and similar games) management contracts than for Class III gaming (such as slot machines and house banked games) management contracts, the apparent justification was that state governments would provide for such investigations in the gaming compacts which are required for Class III gaming. Few states have used the compact process to establish a role in tribal gaming background investigations.

[54] *See* 25 C.F.R. §§ 533.6(b), 537.1.

noted, for business entities owned by numerous shareholders, the NIGC routinely limits background investigations to the ten largest shareholders.[55] The management contractor must facilitate this investigation by providing extensive information on the individuals subject to investigation and by financing the investigation through a fee paid (or guaranteed through a letter of credit) to the NIGC at the time the contract is submitted to the NIGC for review.[56]

The Chairman must disapprove any Class II management contract if the persons with a direct or indirect financial interest is 1) an elected member of the governing body of the tribe that is a party to the management contract, [57]2) has been convicted of a felony or a misdemeanor gaming offense,[58] 3) has knowingly and willfully provided false information to the NIGC or a tribe,[59] 4) has refused to answer questions for the NIGC background investigation,[60] or 5) is determined to be a person "whose prior activities, criminal record, if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of related business and financial arrangements."[61]

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[55] *See* 25 C.F.R. § 537.1(c).

[56] *See* 25 C.F.R. § 537.3.

[57] *See* 25 C.F.R. § 533.6(b)(1)(i).

[58] *See* 25 C.F.R. § 533.6(b)(1)(ii).

[59] *See* 25 C.F.R. § 533.6(b)(1)(iii).

[60] *See* 25 C.F.R. § 533.6(b)(1)(iv).

[61] 25 C.F.R. § 533.6(b)(1)(v).

As to Class III gaming, the standard is less strict. The Chairman may (rather than shall) disapprove a management contract if he finds that a person in the fifth category above has a financial interest or management responsibility related to a management contract.[62] However, the Chairman is somewhat less likely to make such a determination because, in contrast to the extensive background information required for persons involved with Class II management contracts, the principals in a Class III management contract are only required to provide basic information related to identity.[63]

As a practical matter, the NIGC background investigation uses the same methods as investigations in other jurisdictions. Background investigators will review criminal and arrest records and files, determinations from other gaming jurisdictions, financial records, records of court disputes, and any other substantive and reliable information that the background investigations can unearth.

In the gaming industry generally and at the NIGC, this type of review is often called a "suitability determination."[64] However, in the Indian gaming industry, this label is somewhat misleading. Unlike in most regulatory jurisdictions in the commercial gaming industry in which the purpose of the investigation is licensure, a successful background investigation will not result in a formal finding by the NIGC Chairman. Although the unsuitability of an applicant for any of a variety of reasons, such as a prior crimi-

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[62] *See* 25 C.F.R. § 533.6(c).

[63] *See* 25 C.F.R. §§ 533.3(d), 537.1(b).

[64] *See* NIGC Bulletin 94-2—Suitability Determinations (April 20, 1994) (available on the NIGC Web site).

nal record, untruthfulness, or uncooperativeness, is a basis for disapproval of the management contract, no formal finding is made for an approval.[65] Approval of a management contract, at least if it is for Class II gaming, therefore constitutes an implicit finding of suitability.

Although the background investigation is a tedious process, many persons subject to NIGC background investigations are licensed in other jurisdictions. The NIGC has memoranda of understanding with numerous state and tribal gaming jurisdictions which allow the sharing of background information on persons and entities. In light of the cooperation between the NIGC and other jurisdictions and the limited investigative resources of the NIGC, an individual who has successfully completed a full background investigation in another gaming jurisdiction has a favorable chance of obtaining NIGC approval. As a practical matter, the NIGC generally does not seek to impose standards on the Indian gaming industry that are more stringent than the standards that exist in other legitimate gaming jurisdictions and, accordingly, it is unlikely to reach a decision different than other regulatory agencies. Accordingly, if the persons and entities subject to a NIGC background investigation have successfully completed a background investigation in another gaming jurisdiction (a fact that the NIGC specifically requests be disclosed),[66] it would be unusual for the Chairman to disapprove a management contract on the basis of an unsatisfactory background investigation, unless circumstances have changed since the previous background investigation.

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[65] *See* 25 C.F.R. §§ 533.6(b), 537.4.

[66] *See* 25 C.F.R. § 537(b)(1)(viii).

As a practical matter, if a person subject to the background investigation requirements becomes a cause for concern to the NIGC staff, NIGC staff will encourage the parties to restructure the membership of the management contractor to terminate the participation of the person for whom there is concern. The NIGC has worked with parties to remove an individual from the management contract when the person was thought to be unsuitable for participation in a management contract but has approved the contract after removal of the unsuitable person. Thus, it is unusual for a background investigation to become a basis for disapproval of a management contract.

Environmental review

The third significant area of NIGC activity prior to a management contract approval is environmental review in accordance with the National Environmental Policy Act (NEPA),[67] and in rarer cases, the Endangered Species Act (ESA),[68] and related statutes.[69] Under NEPA, federal agencies must identify and consider in their decision-making processes the environmental impact of any agency action significantly affecting the quality of human environment. [70]

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[67] 42 U.S.C. § 4321-4370(d).

[68] 16 U.S.C. § 1536.

[69] Other statutes may apply, depending on the project. For example, a Clean Water Act Section 404 permit may be necessary if the construction involves discharge of dredge and fill materials into waters of the United States. *See* 33 U.S.C. § 1344. State environmental statutes may also apply. Most of these statutes, though they may bind the parties, do not directly affect the NIGC decision-making process and thus are not considered here. They may however significantly affect how parties address issues related to the NIGC's environmental review.

[70] *See generally* 42 U.S.C. § 4332(C).

The NIGC has, at least informally, interpreted its responsibility under NEPA to require the parties to submit an environmental assessment of any management contract under review that involves major construction of a casino.[71]

Under NEPA, after reviewing an environmental assessment, a federal agency must find either that the project has no significant environmental impacts or, if there are such impacts, order the parties to prepare an environmental impact statement (EIS) to catalogue those impacts. In most cases, a middle route is taken in which the agency identifies mitigation measures that will insure that there are no significant impacts. However, if there are such impacts and the parties are then required to prepare an EIS, the NIGC Chairman must consider the EIS in his decision as to whether to approve the contract.

Under the ESA, a federal agency must engage in "section 7 consultation" with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) before proceeding with any action that "may affect" any species listed under the ESA.[72] Informal consultation may be adequate if the action is not likely to have any adverse affect. Formal consultation, including a biological assessment by the action agency (NIGC) and a biological opinion from the consulting agency (FWS or NMFS) will be required if the action is likely to have an adverse effect.[73]

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[71] If construction would not occur "but for" the gaming management contract, the NIGC routinely determines that the gaming management contract review process implicates NEPA and an approval decision may only be issued after environmental review.

[72] *See generally* 16 U.S.C. § 1536.

[73] *See generally* 50 C.F.R. Part 402.

The NIGC has never disapproved a management contact because of significant impacts on the environment. Indeed, the NIGC has never even determined that a casino construction project caused significant environmental impacts requiring the preparation of an environmental impact statement. Because commercial (non-Indian) gaming establishments are not subject to federal approval and therefore need not comply with the NEPA process, NEPA places Indian gaming establishments at a competitive disadvantage as compared with commercial gaming establishments. The NIGC seems to have been sensitive to this concern and has applied NEPA in a manner that would minimize its anti-competitive effects. While an EIS may theoretically be required in some circumstances, NEPA does not require disapproval but merely a full statement of significant impacts before an approval. Accordingly, while the onerous task of preparing an environmental impact statement might slow the process of a management contract, it would be unlikely to result in a disapproval of a management contract.

The NIGC routinely requires environmental assessment of the construction plans and often requires the parties to take sufficient mitigation measures to minimize any such impacts. However, the NIGC has simply never disapproved a gaming management contract based on the casino project's likely impact on the environment.[74] In each case to date in which the

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[74] For example, in 2002, the NIGC issued a finding of no significant impact and ultimately approved a gaming management contract between the Twenty Nine Palms Band of Mission Indians and a gaming management entity including Donald Trump for an Indian casino located at the edge of the Joshua Tree National Park in Southern California. The environmental compliance issues were particularly sensitive in that case in

NIGC Chairman has approved a management contract in which NEPA applied, the Chairman has ultimately issued a "finding of no significant impact" (FONSI) following the environmental analysis and prior to contract approval. Parties have regularly been willing to modify construction plans to mitigate those impacts. In recent years, the Department of Justice has indicated less willingness to defend the NIGC when it conducts environmental assessments and issues FONSIs; the NIGC may therefore be required to insist on an EIS in close cases. On several recent occasions, tribes have been more cautious and have opted to draft an EIS. Because of litigation risk in failing to proceed on this route, parties may be well advised to err on the side of caution in planning the management contract approval process to avoid litigation that will further slow approval.

THE ROLE OF COLLATERAL AGREEMENTS IN NIGC MANAGEMENT CONTRACT REVIEW

A contract for the management of a gaming operation is often only one component of a complex relationship between an Indian tribe and an outside entity. The parties may have also reached numerous agreements for construction and development of the

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light of the facility's proximity to an important and remote National Park with a delicate desert ecosystem. Nevertheless, the environmental compliance was completed and the management contract was approved by the NIGC, all in two years from the time the contract was originally submitted to NIGC for approval. *See* Benjamin Spillman, Trump Visits Spotlight 29 Casino, THE (Palm Springs) DESERT SUN, January 30, 2002 (noting that the agreement was first announced in March of 2000 and presumably was submitted to the NIGC at that time). The NIGC approved the management contract on April 15, 2002. *See* NIGC List of Approved Management Contracts, on the NIGC Web site.

gaming facility and/or other facilities, for financing, for the purchase of land, and for all sorts of other purposes. It is facile to suggest that these other agreements are entirely unrelated to the management contract, however, because the gaming is usually the heart of the entire development.

The NIGC strictly has jurisdiction to review and approve only "management contracts." A management contract that has not been approved by the NIGC is void.[75] The NIGC regulations define management contract as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor . . . if such contract or agreement provides for the management of all or part of the gaming operation."[76] A collateral agreement, in turn, is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between the tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person related to a management contractor or subcontractor)."[77] In other words, a "collateral agreement" is a contract that is either related to a management contract or is between the same or similar parties. Thus, the hypothesized development and construction agreement, the financing agreement(s), and the land purchase agreement are often considered "collateral agreements" either because they are related to the management agreement and/or because they are between the same or similar parties.

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[75] *See* 25 C.F.R. § 533.7.

[76] 25 C.F.R. § 502.15.

[77] 25 C.F.R. § 502.5.

Perhaps because of the perceived circularity of the definition, courts have shown some confusion as to the treatment of collateral agreements and have occasionally presumed that each document meeting the definition of collateral agreement is subject to approval by the NIGC.[78] This approach is incorrect. As a practical matter, the NIGC does not take this view (and has not been a party to the decisions that have discussed the NIGC approval requirements). The NIGC does not approve each document that meets the definition of collateral agreement. Indeed, it has no standards to use for approval of such documents. The NIGC routinely approves management contracts while failing to approve documents collateral to that management contract. It does not intend that such agreements are void; it simply means that the NIGC seeks to approve only that document that actually involves management of a gaming operation. The NIGC has authority to approve a collateral agreement only if it also meets the definition of "management contract," that is, it provides for the "management of all or part of a gaming operation." In short, not all collateral agreements are management agreements. Those that do not meet the definition of "management contract" are not subject to NIGC review.

That is not to say that the NIGC does not seek to review all collateral agreements. There are several reasons why it seeks to review such documents. First, the NIGC must make its own determination as to whether the collateral agreement is also a management contract. Since a management contract is void

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[78] *See, e.g., Catskills Development v. Park Place Entertainment*, 144 F.Supp.2d 215 (S.D.N.Y. 2001), 154 F.Supp.2d 696 (S.D.N.Y. 2001), 217 F.Supp.2d 423 (S.D.N.Y. 2002).

absent NIGC approval, it is prudent to allow the NIGC to undertake such review. These contracts under review, referred to internally at NIGC as "R contracts," are often found by the NIGC not to be management contracts. Upon request, the NIGC will review a contract and issue a letter indicating that the contract is not subject to the management contract review and approval process.

Second, the NIGC must look at collateral agreements as part of its review of the management contract. The NIGC must obtain a full and complete disclosure of the financial relationship between the tribe and the contractor or related entities to insure that the parties have not sought to evade the compensation limits set forth in IGRA. Most management contractors are paid not a fixed fee, but a percentage of gaming revenues. One concern is that parties might seek to evade those limits by hiding additional terms of compensation for management in other agreements that receive far less NIGC scrutiny. To determine whether the parties have exceeded IGRA's compensation limits, NIGC staff must have a clear understanding of the entirety of the financial relationship between the parties and thus a full comprehension of the compensation to the management contractor.

Although a tribe may lawfully compensate the management contractor for rendering services other than gaming management, the NIGC will scrutinize all collateral agreements, such as loan and financing agreements, development agreements, hotel and retail operation agreements, land purchase agreements, to insure that the compensation terms in those contracts are fair for the services rendered and that those agreements thus are not intended to allow

the parties to evade the compensation limit of thirty percent of net gaming revenues. The NIGC will scrutinize these other contracts to insure that the fees are adequately supported by valuable consideration.

Consider, for example, a loan agreement that contains terms that are substantially higher than current market rates. While parties might seek to justify such terms by arguing that such investments are risky, the Indian gaming industry has developed a sufficient track record that financing has become much less expensive for tribal casinos. Thus, a financing arrangement involving the same or similar parties in the management agreement that provides an independent source of economic advantage might appear suspicious under close NIGC scrutiny. If other financing is available elsewhere at substantially lower rates, the NIGC may withhold approval of the management contract until it is satisfied that the financing agreement is not an attempt to evade IGRA compensation standards. In other words, the NIGC's management contract approval authority may be used by NIGC staff to require the parties to lower the financing costs, even if the financing agreement is technically a collateral agreement that does not rise to a management agreement.

The NIGC tends to be uncomfortable with ancillary contracts that provide for additional percentage participation in the gaming revenues. If, for example, a management contractor is earning a management fee between 30 and 40 percent of gaming revenues and seeks an additional percentage of gaming revenues for non-management services, such as financing or development fees, the NIGC may be concerned that the manager/financer/lenders' share of the gaming revenues may leave the tribe with a very small por-

tion, rendering the operation unprofitable for the tribe. Thus, the NIGC generally prefers that other services be provided on the basis of a fixed or hourly fee. It cannot insist on such terms when the financer or developer is an entirely unrelated entity not engaging in management because it lacks authority over such parties. Where the development or financing contract meets the definition of collateral agreement because the parties are related, however, the NIGC can be more insistent.

In summary, the NIGC created a broad definition of the term "collateral agreement" to insure that it can review all the documents needed for meaningful management contract review. Thus, review of collateral agreements is a key ancillary aspect of management contrast review.

APPENDIX W

[Logo] National
Indian
Gaming
Commission

1441 L Street, N.W. 9th Floor Washington, D.C. 20005
Tel: 20-632-7003 Fax: 202-632-7066

May 24, 2000

Thomas Aro, President
Alpha Hospitalty Corporation
12 East 49th Street
New York, NY 10017
Fax (212) 750-3508

Dear Mr Aro:

Based on your letter of May 18, 2000, there appears to be some confusion about the NIGC"s processing of your response to the contract deficiency letter issued on April 19, 2000, for the management contract between the St. Regis Mohawk Tribe (Tribe), St. Regis Gaming Authority (Gaming Authority), and Mohawk Management, LLC (Manager). The purpose of this letter is to make clear our position.

The NIGC will undertake a review of the joint response to the contract deficiency letter from the Tribe, Gaming Authority, and Manager. Please note that the response must be from all parties before we will commence our review. In addition, as noted in the letter of April 19, 2000, if we do not receive a response within 60 days, we may recommend that the Chairman disapprove the contract.

If you have any questions, please call either Elaine Trimbie or me at (202) 632-7003.

Sincerely,

/s/ Fred W. Stuckwisch
Fred W. Stuckwisch
Director of Contracts

cc: Tribal Chiefs, St. Regis Mohawk Tribe
Via fax only - (518) 358-3203
Management Board, St. Regis Mohawk Gaming Authority
Via fax only (518) 358-3203
Morad Tahbaz, Mohawk Management, LLC
Via fax only - (914) 791-1402

APPENDIX X

Mohawk Management, L.L.C.
12 East 49th Street
24th Floor
New York, New York 10017

June 5, 2000

Fred W. Stuckwisch
Director of Contracts — Via Facsimile
National Indian Gaming Commission
1441 L Street, N.W.
9th Floor
Washington, D.C. 20005

Re: St. Regis Mohawk's Management/Development Agreements with Mohawk Management, L.L.C. and Monticello Raceway Development Company, L.L.C.

Dear Mr. Stuckwisch:

Thank you for your May 24, 2000 letter. Regrettably, it appears that the St. Regis Mohawk Tribal Council has entered into an agreement renouncing the above referenced agreements for the proposed casino at the Monticello Raceway. However, we do want to take the opportunity to thank you and your staff for all of your efforts and work to date.

Very truly yours,

MOHAWK. MANAGEMENT, L.L.C.

/s/ Thomas W. Aro
Thomas W. Aro
President

NATIONAL
INDIAN
GAMING
COMMISSION

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June 12, 2000

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Management Board
St. Regis Mohawk Gaming Authority
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Morad Tahbaz
Mohawk Management, LLC
Monticello Raceway
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P.O. Box 5013
Monticello, NY 12701
Fax (914) 791-1402

Thomas Aro, President
Alpha Hospitalty Corporation
12 East 49th Street
New York, NY 10017
Fax (212) 750-3508

Re: Restated Gaming Facility Management Agreement, dated July 31, 1996 but signed Novem-

ber 24, 1999, by and among the St. Regis Mohawk Tribe, St. Regis Gaming Authority, and Mohawk Management, LLC and the Amended and Restated Gaming Facility Development and Construction Agreement, dated July 31, 1996 but signed by the Tribe and Gaming Authority November 24, 1999 and by Monticello Raceway Development Company, LLC on December 8, 1999

Dear Tribal Chiefs, Management Board Members, Mr. Tahbaz, and Mr. Aro:

On June 5, 2000, the National Indian Gaming Commission (NIGC) received a letter from Thomas Aro informing us that the St. Regis Mohawk Tribe had entered into an agreement renouncing both the referenced agreements. We are taking this to mean that the referenced agreements are withdrawn from the approval process and therefore, the NIGC will not take any further action on these agreements.

Should you have any questions, please call either Elaine Trimble or me at (202) 632- 7003.

Sincerely,

/s/ Fred W. Stuckwisch
Fred W. Stuckwisch
Director of Contracts

cc: George Skibine, IGMS
Fax (202) 273-3153

APPENDIX Y

RELEVANT STATUTORY PROVISIONS

1 U.S.C. §1. Dictionary Act

In determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . words used in the present tense include the future as well as the present . . .

25 U.S.C. §81 Agreements with Indian Tribes [Before Mar. 14, 2000]

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: . . . All contracts or agreements made in violation of this section shall be null and void.

25 U.S.C. §81 (2000) Contracts and Agreements with Indian Tribes

(a)(1) The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(b). Approval No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(f) Construction—Nothing in this section shall be construed to—(2) amend or repeal the authority of the National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*)

25 U.S.C. §2701 Findings

The Congress finds that–

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. §2702. Declaration of policy

The purpose of this chapter is–

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. §2703. Definitions

For purposes of this chapter–

(4) The term "Indian lands" means–

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which–

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7) (A) The term "class II gaming" means–

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)–

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that–

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

25 U.S.C. §2705. Powers of Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to–

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710 (d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

25 U.S.C. §2706. Powers of Commission

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

25 U.S.C. §2710. Tribal gaming ordinances

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2) (A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)].

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as

conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12 [25 USCS § 2711(b)-(d), (f)-(h)].

25 U.S.C. §2711. Management contracts

(a) Class II gaming activity; information on operators.

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1) [25 USCS § 2710(b)(1)], but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stock-

holders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval. The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues.

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension. By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval. The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the

business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land. No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority. The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

25 U.S.C. §2714. Judicial review.

Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

25 U.S.C. § 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary.

Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act . . .

(b)Exceptions.

(1)Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination . . .

REGULATIONS

25 C.F.R. §502.5 Collateral Agreement

Collateral agreement means any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any

of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor).

25 C.F.R. §502.10 Gaming Operation

Gaming operation means each economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses. A gaming operation may be operated by a tribe directly; by a management contractor; or, under certain conditions, by another person or other entity.

25 C.F.R. §502.12 Indian Lands

Indian lands means:

(a) Land within the limits of an Indian reservation; or

(b) Land over which an Indian tribe exercises governmental power and that is either—

(1) Held in trust by the United States for the benefit of any Indian tribe or individual; or

(2) Held by an Indian tribe or individual subject to restriction by the United States against alienation.

25 C.F.R. §502.15 Management Contract

Management contract means any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation.

25 C.F.R. §533.4. Action by the Chairman

(a) The Chairman shall provide notice of noncompliance under §533.5 of this part, or shall approve or

disapprove a management contract applying the standards contained in §533.6 of this part, within 180 days of the date on which the Chairman receives a complete submission under §533.3 of this part, unless the Chairman notifies the tribe and management contractor in writing of the need for an extension of up to ninety (90) days.

(b) A tribe may bring an action in a U.S. district court to compel action by the Chairman:

(1) After 180 days following the date on which the Chairman receives a complete submission if the Chairman does not provide notice of noncompliance or approve or disapprove the contract under this part; or

(2) After 270 days following the Chairman's receipt of a complete submission if the Chairman has told the tribe and management contractor in writing of the need for an extension and has not provided notice of noncompliance or approved or disapproved the contract under this part.

25 C.F.R. §533.7. Void Agreements

Management contracts and changes in persons with a financial interest in or management responsibility for a management contract, that have not been approved by the Secretary of the Interior or the Chairman in accordance with the requirements of this part, are void.

APPENDIX Z

Calendar No. 270

106 TH Congress
1st Session

SENATE

REPORT
106-150

ENCOURAGING INDIAN ECONOMIC DEVELOPMENT, TO PROVIDE FOR THE DISCLOSURE OF INDIAN TRIBAL SOVEREIGN IMMUNITY IN CONTRACTS INVOLVING INDIAN TRIBES, AND FOR OTHER PURPOSES

SEPTEMBER 8, 1999.—Ordered to be printed

MR. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 613]

The Committee on Indian Affairs, to which was referred the bill (S. 613) to encourage Indian economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends the bill as amended do pass.

PURPOSE

The purpose of S. 613, as amended, is to replace the provisions of the Act of May 21, 1872, Section 2103 of the Revised Statutes, found at 25 U.S.C. §81

(Section 81) to clarify which agreements with Indian tribes require federal approval, to specify the criteria for approval of those agreements, and to provide that those agreements covered by the Act include a provision either disclosing or addressing tribal immunity from suit. S. 613 also amends the Indian Reorganization Act of 1934 and § 81 to eliminate any statutory requirement for federal review of tribal contracts with attorneys.

BACKGROUND

The federal government is the legal trustee for Indian lands. As a result, these lands may not be sold or leased except in a manner consistent with federal law. In addition, an 1872 statute, Section 2103 of the Revised Statutes, found at 25 U.S.C. §81 requires federal approval of agreements "relative to" Indian lands owned by a tribe or "Indians not citizens of the United States." Section 81 includes a list of technical requirements for such agreements and provides that any agreement that does not conform with its requirements is null and void and all amounts paid by a tribe or on the tribe's behalf are to be disgorged. Finally, the statute authorizes parties to bring suit to enforce the statute "in the name of the United States in any court of the United States, regardless of the amount in controversy."

Enacted in 1872, Section 81 reflects Congressional concerns that Indians, either individually or collectively, were incapable of protecting themselves from fraud in the conduct of their economic affairs.[1]

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[1] The legislative history reveals that Congress enacted this statute because of concerns about individuals retained by tribes to assert claims on their behalf. See *In re United States ex rel.*

As explained by the Supreme Court: "The early legislation affecting the Indians has as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others * * *"[2] The Indian Reorganization Act of 1934 (IRA) represented a fundamental break with this policy. As the Supreme Court explained: "The intent and purpose of the [IRA] was 'to develop the initiative destroyed by a century of oppression and paternalism.'" [3] The IRA's sponsor in the Senate, Senator Burton K. Wheeler characterized the purpose of the IRA: "[It] seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian council or in the hands of a corporation organized by the Indians." [4]

Indian tribes, their corporate partners, courts, and the Bureau of Indian Affairs (BIA) have struggled for decades with how to apply Section 81 in an era that emphasizes tribal self-determination, autonomy, and reservation economic development.

Although the IRA did not explicitly amend Section 81, it was soon apparent that the two laws were based on fundamentally inconsistent principles. This

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Hall, 825 F. Supp. 1422, 1431–2 (1993), *aff'd* 27 F.3d 572 (8th Cir. 1994).

[2] *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 579 (1928).

[3] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973), quoting H.R. Rep. No. 1804, 73rd Cong., 2nd Sess., 6 (1934).

[4] *Id.* at 152, quoting 78 Cong. Rec. 11125.

left those concerned with tribal transactions with the difficult task of reconciling an 1872 statute that sought to protect Indian tribes by imposing extensive federal oversight with a 1934 Act intended "to disentangle the tribes from official bureaucracy." [5]

A 1952 Opinion by the Department of Interior's Office of the Solicitor represents one attempt to reconcile these two statutes.6[6] The opinion addresses two separate transactions by two different tribal entities. Although both entities were organized pursuant to the IRA, one entity traced its authority to a tribal corporation chartered under Section 17 of the IRA (25 U.S.C. § 477), while the other was organized under an IRA constitution pursuant to Section 16 of the IRA (25 U.S.C. §476). With respect to the Section 17 corporation, the Solicitor pointed out that the IRA allowed the Secretary to grant charters that authorized Indian tribes to mortgage or lease tribal lands for any period up to 10 years. Thus, the Solicitor reasoned that the Secretary could "grant to the tribe freedom to make contracts without complying with the requirements prescribed in [Section 81]."

The Solicitor reached this conclusion even though Section 17 precluded the Secretary from granting to the tribe incidental corporate powers which are "inconsistent with the law." The Solicitor interpreted this phrase very restrictively, to include only those "powers which cannot lawfully be given to any corporation, non-Indian or Indian." This interpreta-

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[5] *Id.* at 153.

[6] *Contracts for the Employment of Managers of Indian Tribal Enterprises*, Opinion of the Solicitor, February 14, 1952 (M–36119).

tion was consistent with the purpose of incorporation, which was characterized by the Solicitor as "the means for the conduct of business activities in a business-like way. * * *"Having concluded that nothing in Section 17 prohibited the Secretary from freeing a tribal corporate entity from the dictates of Section 81, the Solicitor then concluded that a provision authorizing the tribe to enter into land leases of up to ten years and contracts of up to $5,000 per year, without BIA review, should be interpreted as such an exemption.[7]

Nevertheless, the Solicitor opined that Section 81 was applicable to a farm manager's contract with an Indian tribe organized pursuant to Section 16. The Solicitor explained that in addition to the powers which were explicitly to be vested in the tribe under Section 16. the tribe retained "all powers vested * * * by existing law." The Solicitor then stated: "We do not find here any grant of power to make contracts without regard to the requirements [Section 81]." This conclusion deviates from the Solicitor's long-standing practice, which continues to this day, of interpreting the IRA as a codification rather than the

[7] It is worth noting that the actual Section 17 corporate charter under consideration in the 1952 opinion was granted to the Minnesota Chippewa Tribe. However, the agreement which was under consideration (and found not to require Section 81 approval) was an agreement between a non-Indian and the Grand Portage Band, "one of the constituent bands of the Minnesota Chippewa Tribe." Thus, it would seem to follow that any tribe with Section 17 corporation could confer similar authority on any of its subordinate economic entities, at least up to the extent of any conditions contained in its corporate charter.

source of tribal authority.[8] Hence, it is surprising that the Solicitor would look to the Section 16 for a "grant" of authority.

In fact, the Solicitor recognized that the IRA "was intended to make a new point of departure in the relations between the tribes and the Government," but reasoned that a repeal by implication was disfavored. Certainly Section 16 did not explicitly exempt the contract at issue from Section 81, but neither did Section 17 of the IRA. In addition, the Solicitor pointed out that it would be "unsafe" to assume that

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[8] Finding that Section 81 was inapplicable to the Section 17 contract was consistent with the longstanding principle that federal laws, including the IRA, are not the source of tribal authority.

> Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. *The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty* rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, "powers vested in any Indian tribe or tribal council by existing law."—Powers of Indian Tribes, 55 Interior Decision 14 (October 25, 1934) (emphasis supplied).

However, applying Section 81 to the farm manager's contract apparently disregards an equally important principle articulated in the same 1934 opinion: "The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference." Another example where this important principle may have been disregarded is *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (1983) (Secretarial approval needed to both approve and terminate lease).

Section 81 was inapplicable because the failure to comply with its requirements would subject the contracting party to a fine and the loss of any benefit conferred upon the party by the tribe. Again, the same risk applies to contracts with section 17 corporations and counsels in favor of assuming that Section 81 applies to those contracts.

The Solicitor's decision represents an attempt to reconcile two statutes that derive from two fundamentally different eras with little guidance from Congress on how these statutes were to be harmonized. The opinion also freed at least some Indian tribes from the onerous requirement of obtaining federal approval for a potentially vast array of contracts.[9] Nevertheless, a number of problems remain unresolved. For example, until 1991, Section 17 charters were only granted by the Secretary after a vote of a tribe's membership. Second, the Solicitor's 1952 opinion did not provide any guidance concerning the appropriate reach of Section 81's application to agreements "relative to Indian lands." Even where there is no question that Section 81 applies to an agreement, it provides no standards for the BIA to apply when deciding whether to approve a proposed agreement.[10] In

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[9] Another Solicitor's Opinion recognized that an Indian tribe could organize its political institutions under Section 16 of the IRA and still obtain a Section 17 charter for purposes of conducting business. Separability of Tribal Organizations Organized Under Sections 16 and 17 of the I.R.A. 65 Interior Dec. 483 (November 20, 1958).

[10] In one case where a private party sought judicial review of a decision under Section 81, the United States argued that judicial review should be unavailable because the Act did not contain sufficient standards to allow the court to determine how the Act should be applied to the case.

addition, as the tribal transactions became increasingly more complex, the BIA often lacked the resources or expertise necessary to adequately review proposed contracts.

As federal policy increasingly emphasized tribal-self-determination by reducing or eliminating federal review of tribal decisions, Congress has both directly and indirectly addressed concerns about Section 81. For example, in 1958, Congress removed a provision from Section 81 which required the execution of these agreements in the presence of a judge.[11]

More recently, Congress explicitly cited problems with Section 81 review of management agreements as a justification for enacting the Indian Mineral Development Act of 1982, P.L. 97–382:

> [T]he approval procedure for non-lease ventures under Section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of the 1938 act, or

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As an alternate basis on which to affirm the district court['s decision to dismiss], *the government asserts* that "review [of Interior Department decisions under 25 U.S.C. § 81] is not to be had [because] the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Stock West Corporation v. Lujan*, 982 F.2d 1389, 1399–1400 (1993) (Emphasis supplied, internal quotation to *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Obviously, if the government takes the position that Section 81 provides courts with no discernible standards for applying the statute, tribes and their (potential) partners are similarly at a loss to determine how and whether the Act will be applied. Such uncertainty is anathema to reservation development.

[11] 11 Public Law 85–770

> an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). [In addition], with the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described. Without clarification of the Secretary's authority for approval of existing ventures, because of the confusion concerning the Secretary's authority to approve non-lease ventures, the Department is reluctant to approve a number of proposed agreements which are pending.[12]

More general relief was provided by Congress in 1990 when it made several changes to Section 17 of the IRA. Public Law 101–301 amended the IRA by eliminating the requirement for a reservation-wide plebiscite before the Secretary of Interior could confer a corporate charter pursuant to Section 17. In addition, it authorized section 17 tribal corporations to lease Indian lands without Secretarial approval for up to 25 years.[13] As enacted the IRA limited such leases to 10 years.

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[12] H.R. Rep. No. 746, 97th Cong., 2nd. Sess. 1982.

[13] As passed by the Committee, S. 613 would eliminate the basis in federal law for Secretarial review or approval of a number of contracts and agreements. As a question of tribal law, however, Section 17 charters, tribal constitutions, or tribal by-laws may include terms that require Secretarial approval of agreements. In addition, some of these documents may require Secretarial approval of any amendments to those organic documents. There is no reason to assume that the Secretary does not possess the authority to approve duly authorized amendments to such documents. Certainly S. 613, P.L. 101–301, and the IRA demonstrate a clear Congressional policy in favor of reducing federal review of tribal decisions and agreements.

In addition, the Tribal Self-Governance Act, established as a component of the Indian Self-Determination and Education Assistance Act,[14] makes Section 81 inapplicable to participating Indian tribes during the terms of their participation in Self-Governance.[15] These Indian tribes are also exempt from any requirements under either 25 U.S.C. § 81 or § 476 to submit attorney contracts for federal approval.

While these laws have allowed some Indian tribes to engage in business transactions without needing to conform with requirements that were intended to shield them from "their own improvidence and the spoliation of others," it left Section 81's core provisions intact. As a result, neither tribes, their partners, nor the BIA could predict with any certainty whether a court might ultimately conclude that a transaction was void because it was not approved pursuant to Section 81. The risk that a court might make such a conclusion was exacerbated by severity of the penalty for noncompliance borne by the party contracting with the tribe.

For example, in 1985, in *Wisconsin Winnebago Business Committee v. Koberstein*, 726 F.2d 613 (7th Cir. 1985) the United States Court of Appeals for the 7th Circuit ruled on the applicability of Section 81 to a five-year agreement with a corporation "to assist the [tribal business committee] in obtaining financing, construct, improve, [develop], manage, operate and maintain [specified tribal lands] as a facility for the conduct of bingo games. * * *" The proposed agreement was submitted to the BIA Area

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[14] P.L. 93–638, 25 U.S.C. 450 et seq.

[15] 25 U.S.C. §458cc(h)(2) and §4501(b)(15).

Office and the Department of Interior Field Solicitor. The Solicitor determined that Section 81 did not apply to the agreement. Nevertheless, the Court of Appeals ruled that it did.[16]

The *Koberstein* case concerned an Indian tribe's attempt to prevent the operation of a bingo facility run by an individual who failed "to disclose the potential conflict of interest between his duties as tribal attorney and his position as president of the [bingo management company]." Thus, it is not surprising that the court ruled that the agreement was void. In its defense, the company sought to argue that Section 81 should be interpreted in light of subsequent Congressional enactments that limit federal review of tribal decisions and encourage tribal economic development. For example, the Supreme Court wrote in 1976: "[W]e previously have construed the effect of legislation affecting reservation Indians in light of "intervening" legislative enactments.[17] *The Koberstein* court brushed these arguments aside, relying instead on the Supreme Court's analysis in cases addressing the preemption of state law in matters affecting Indian tribes and their members. In these cases, the Court has refused to be swayed by "modern conditions" that arguably counsel in favor of state regulation or taxation of the activities of Indian tribes or their members.[18] In cases involving

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[16] Since the contracting party in this case was unaware of the BIA's determination that Section 81 was inapplicable, the court of appeals did not address whether principles of estoppel and/ or detrimental reliance precluded its application after BIA found that an agreement was not covered by Section 81

[17] *Bryant v. Itasca County*, 426 U.S. 373, 386, quoting *Moe v. Salish & Kootenai Tribes*, 425 U.S., at 472–5 (1976).

[18] *Central Machinery Co. v. Arizona*, 448 U.S. 160, 166 (1980).

preemption, the Court has indicated that statutes are "given a sweep as broad as their language." Applying this principle to the relationship between tribes and the federal government, the court determined that section 81 should be interpreted broadly: "[S]ection 81 governs transactions relative to Indian lands for which Congress has not passed a specific statute." This approach is inconsistent with the principle that "The acts of Congress which appear to limit the powers of Indian tribes are not to be unduly extended by doubtful inference." [19] In fact, the court conceded: "No federal cases have been presented to us * * * that comprehensively analyze the scope of coverage of section 81."

Soon after *Koberstein* was decided, the 9th Circuit Court of Appeals adopted its reasoning and conclusion in a suit where a gaming management company sued to enforce an agreement that was not approved by the BIA pursuant to section 81. In this case a company sought to argue that section 81 was not applicable to the agreement, even though its agreement with the tribe recognized that section 81 approval was a prerequisite to the contract. *A.K. Management Company v. The San Manuel Band of Mission Indians,* 789 F.2d 785 (9th Cir. 1986).

In response to federal court cases finding Section 81 applicable to gaming management contracts and as part of the federal policy that encourages Indian tribes to engage in gaming activities comparable to those offered within a state, the Department published guidelines for the approval of these

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[19] 55 Interior Dec. 14 (October 25, 1934). *See* footnote 8.

agreements.[20] Federal courts cited these guidelines as evidence of a reversal of the Department's previous position that Section 81 did not apply to these agreements, even though the BIA was seeking legislative clarification of the statute in response to these decisions. As a result, the application of Section 81 to gaming management agreements was well established as a question of law, even though some federal courts characterized "the draconian remedy of the statute [as] distasteful." One federal court argued that the statute might cause more harm than good: "[Section 81] imposes a penalty out of proportion to the purely technical violations if proscribes. It seems likely that tribes may be hurt rather than protected by the disruption of their successful business relationships." [21]

At its May 19, 1999 hearing, the Commission heard testimony that tribes and their partners are unable to eliminate the uncertainty created by Section 81. In

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[20] "[T]he Department of the Interior, which has the primary responsibility for carrying out the Federal Government's trust obligations to Indian tribes, has sought to implement these policies by promoting tribal bingo enterprises. Under the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1982 ed. and Supp. III), the Secretary of the Interior has made grants and has guaranteed loans for the purpose of constructing bingo facilities * * * [T]he Secretary of the Interior has approved tribal ordinances establishing and regulating the gaming activities involved. The Secretary has also exercised his authority to review tribal bingo management contracts under 25 U.S.C. §81, and has issued detailed guidelines governing that review." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 217–8 (1987) (emphasis supplied and citations omitted).

[21] *U.S. v. D & J Enterprises*, 1993 WL 76789 (W.D. Wis. 1993) (finding that Section 81 voided the agreement even though the tribe was represented by competent legal counsel and there was no evidence of fraud or duress).

this respect, Section 81 differs from the doctrine of tribal sovereign immunity. Any uncertainty about whether tribal immunity will prevent the enforcement of an agreement with an Indian tribe can be addressed and eliminated through the terms of an agreement with the tribe or by some other means. Courts have ruled, however, that parties may not waive the application of Section 81 in the same manner. In fact, it appears that Section 81 prevents a tribe from binding itself to an agreement that it will not raise its provisions as a defense if litigation ensues.[22] In addition, some courts have interpreted the last paragraph of Section 81 as allowing *qui tam* suits against the party contracting with the tribe. In some cases, such suits can be brought by parties other than the tribe or the United States.[23] Thus, even if the parties decide that Section 81 is inapplicable and agree that they will not subsequently employ it as a defense to the contract's enforcement, third parties can bring suit and at least disrupt the contract's performance through costly and lengthy

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[22] For example, courts have ruled that an agreement that is void pursuant to Section 81 "[the agreement] cannot be relied upon to give rise to any obligation by [the tribe], including an obligation of good faith and fair dealing." *A.K. Management Co. v. The San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (1986).

[23] Based on this interpretation, non-parties to the contract can sue a party contracting with the tribe if the agreement was not approved under Section 81. This result was soundly criticized by one court as "bestowing a windfall" for litigants, even where there is no evidence of fraud or duress. *U.S. v. D & J Enterprises*, 1993 WL 767689 (W.D. Wis. 1993). Subsequently, the 7th Circuit Court of Appeals ruled muted the effect such suits by ruling that the tribe is an indispensable party under F.R.C.P. Rule 19 *United States ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476 (7th Cir. 1996).

litigation. In addition, even where the BIA determines that a contract does not fall within the purview of Section 81, courts are not bound by this conclusion. Thus, Section 81 produces uncertainty and leaves Indian tribes, their business partners, and the BIA powerless to eliminate this uncertainty.

Another concern relates to the increasing complexity of tribal transactions. Quoting from Congressional proceedings, one U.S. District Court noted: "Section 81 was enacted to protect the Indian tribes at a time when Congressmen believed that '[t]here are no Indians, as a tribe or as individuals, that are competent to protect themselves against the enterprise and the fraud of the white man.'" [24] There is no justification for such an assumption to provide the basis for federal policy in this era of tribal self-determination.[25]

Similarly, there is no basis to require, as a matter of federal law, that tribes must submit their attorney contracts to the federal government for approval. For example, during the 100th Congress, the Interior Department's Assistant Secretary for Indian Affairs Ross O. Swimmer suggested that a bill amending the

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[24] *U.S. v. D & J Enterprises*, 1993 WL 76789 (W.D. Wis. 1993), quoting Senator Davis, Cong. Globe 1484.

[25] 25 In fact, there is some evidence that the Seventh Circuit recognizes the difficulty of applying its *Koberstein* rule in a manner that makes Section 81 applicable to "nearly all transactions relating to Indian lands." *Altheimer & Gray v. Sioux Manufacturing Corp*,. 983 F.2d 803 (1993) (reversing district court ruling that applied Section 81 to an agreement with an entity that was more than a consultant, but which lacked exclusive control over a non-gaming facility owned by a tribe.)

IRA should include a provision eliminating this requirement.

> [W]e recommend that [the bill] as passed by the House by amended to eliminate the current statutory requirements that the Secretary approve the tribal selection of tribal attorneys and attorney fees (25 U.S.C. section 81 and 476). It would be consistent with the goals of Indian self-determination to allow the tribes to choose their own attorneys and set the rate of compensation without the Secretary's oversight.[26]

The current Administration has also indicated its support for such a provision and S. 613 incorporates this proposal.

SUMMARY OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

Section 1. Short title

Section 1 cites the short title of the bill as the Indian Tribal Economic Development and Contract Encouragement Act of 1999.

Section 2. Contracts and agreements with Indian tribes

Section 2 of the bill replaces the text of 25 U.S.C. § 81 with six subsections.

Subsection (a) provides definitions for the terms "Indian lands," "Indian tribe," and "Secretary." Perhaps a definition for Indian lands is intended to circumscribe the scope of this statute to those lands

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[26] 26Sen. Rep. 100–577, 100th Cong. 2nd Sess. (1988), letter from Assistant Secretary Ross O. Swimmer to then-Chairman of the Committee on Indian Affairs, Senator Daniel K. Inouye, dated September 7, 1988.

where title is held in trust for a tribe or a restraint on alienation exists as a result of the principle, dating from the Revolutionary War Era, that the federal government must hold title to Indian lands in furtherance of the federal-tribal trust relationship.

Subsection (b) provides that agreements or contracts with Indian tribes that encumber Indian lands for a period of seven or more years are not valid unless they bear the approval of the Secretary of Interior or a designee of the Secretary. Under present law, Section 81 is susceptible to the interpretation that any contract that "touches or concerns" Indian lands must be approved. In addition, because of the "draconian" nature of the penalty for non-compli ance, parties frequently "erred on the side of caution" by submitting any contract with a tribe to the BIA for approval. Deputy Commissioner for Indian Affairs Michael J. Anderson testified: "Contracts for the sale of vehicles to tribes, maintenance of buildings, construction of tribal government facilities, and even the purchase of office supplies are now routinely presented to the BIA for review and approval." As reported by the Committee, subsection (b) will allow tribes and their contracting Partners to determine whether Section 81 applies when they form an agreement. First, by limiting the provision's applicability to those agreements with a duration of seven of more years, parties can look to an objective measure to determine whether an agreement falls within the scope of the statute. Also, by replacing the phrase "relative to Indian lands," with "encumbering Indian lands," the bill will ensure that Indian tribes will be able to engage in a wide array of commercial transactions without having to submit those agreements to the BIA as a precaution. Two other provisions also advance this objective. First,

subsection (e) directs the Secretary to issue regulations identifying the types of agreements not covered by the Act. Second, by eliminating the *qui tam* provisions in the statute, the bill eliminates the possibility that third parties will bring suits without the consent of any of the parties to the agreement.

At the Committee's May 19, 1999 hearing, the Administration proposed simply eliminating Section 81 entirely. Although the amendment in the nature of a substitute reported by the Committee addresses many of the Department's concerns, it leaves the provision in place to address a limited number of transactions that could place tribal lands beyond the tribe's ability to control the lands in its role as proprietor.

The amendment eliminates the overly-broad scope of the Act by replacing the phrase "relative to Indian lands" with the phrase "encumbering Indian lands." By making this change, Section 81 will no longer apply to a broad range of commercial transactions. Instead, it will only apply to those transactions where the contract between the tribe and a third party could allow that party to exercise exclusive or nearly exclusive proprietary control over the Indian lands. For example, a lender may finance a transaction on an Indian reservation and receive an interest in tribal lands as part of that transaction, If, for example, one of the remedies for default would allow this interest to ripen into authority *to operate* the facility, this would constitute an adequate encumbrance to bring the contract within Section 81. By contrast, if the transaction concerned "limited recourse financing" and the lender merely acquired the first right to all of the revenue derived from specified lands for a period of years, this would not

constitute a sufficient encumbrance to bring the transaction within Section 81. A more difficult case would involve a situation where a designated third-party would operate the facility in the case of default. In essence, with the exception of those tribes exempted pursuant to the Self-Governance program, Section 81 will apply to those transactions that are not leases, per se, but which could result in the loss of tribal proprietary control.

The bill also proscribes the Act's application to those agreements that take more than 7 years to complete. Just as the statute of frauds looks at transactions when they are entered into, this provision is concerned with the reasonable expectations of the parties when they enter an agreement.

Subsection (c). In addition to the provisions that allow Indian tribes and their partners to determine with a much greater level of certainty whether Section 81 applies, subsection (c) provides that a BIA determination that an agreement is not covered by Section 81 has the effect of making the section inapplicable. It would contradict the bill's intent if parties made a practice of submitting agreements where Section 81 is patently inapplicable, simply to obtain an official endorsement of this conclusion. To be sure, such official determination may be necessary, especially when tribal obligations are to be sold in the secondary market. This subsection may help eliminate uncertainty and increase the marketability of transactions involving tribal obligations. If a practice develops where agreements are submitted even where it is patently obvious that Section 81, as amended, does not apply, the BIA may find it necessary to simply return these agreements

without making any determination, even the determination authorized by subsection (c). Such action may not be necessary, but might be needed to preclude the waste of limited BIA staff resources.

Finally, this subsection is intended to work in conjunction with subsection (e), which directs the Secretary to enact regulations establishing which agreements are not covered by Section 81.

Subsection (d). Under subsection (d), the Secretary is to refuse to approve any agreement otherwise covered by the Act, if it is in violation of federal law or if it fails to address sovereign immunity in one or more of the three ways specified.

Violation of Federal law

Consistent with the principles of tribal self-determination, this bill does not direct the BIA to substitute its business judgment over that of a tribal government. This is not to say that the Department may not offer and tribes may not seek advice or assistance in negotiating, preparing, or submitting agreements covered by Section 81, as amended. Since the enactment of the IRA, at least those tribes with corporate charters conferred pursuant to Section 17 of that Act have been authorized to enter agreements without Section 81 approval.27[27] In addition, those tribes participating in Self-Governance are also free from the requirements of Section 81. The Committee has not been informed that this has resulted in any widespread problems. In fact, the Department's May 19, 1999 testimony in favor of striking all of Section 81 clearly demonstrates that it does not believe that

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[27] See the discussion of the February 14, 1952 Solicitor's Opinion accompanying footnote 6.

federal review of such agreements is necessary. For that reason, in place of more intrusive review, the bill will limit the Secretary's determination to whether the agreement would violate federal law. Since these agreements will bear the imprimatur of federal approval, it is appropriate for the Secretary to be satisfied that the agreement does not contravene any specific statutory prohibitions.

Tribal sovereign immunity

Over the last several years, the Committee has held extensive hearings on tribal sovereign immunity.[28] Over the course of these hearings, Committee members have expressed divergent views about the value, effect, and even the purpose and justification for the doctrine. One view closely parallels that of Supreme Court Justice Stevens, who has written: "there is no justification for permanently enshrining the judge-made law of sovereign immunity." This view questions the philosophical justification for the doctrine with respect to the federal government, states, or Indian tribes. With respect to Indian tribes, Justice Steven's dissent in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 761 (1998) criticizes tribal immunity by arguing that "Indian tribes[s] enjoy broader immunity than the States, the Federal government, and foreign nations[]." In his *Kiowa* dissent, Justice Stevens pointed out that his opinion for the Court in *Nevada v. Hall*, 440 U.S. 410 (1979) precludes states from asserting immunity in the courts of another state because one state's ability to

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[28] These hearings include S. Hrng. 104–694 (September 24, 1996) and S. Hrng. 105–303, Parts I, II, and III (March 11, April 7, and May 6, 1998 respectively).

plead immunity is a question of comity rather than a constitutional command. By contrast, he pointed out that the Court's ruling in Kiowa makes the result in *Nevada v. Hall* inapplicable to Indian tribes appearing in state courts, probably based on the principle urged by the United States that tribal immunity is a matter of national, rather than state, policy.[29]

Another perspective articulated by members of the Committee begins with the premise that Indian tribes, are one of the three domestic sovereign entities recognized by the United States Constitution. Recent Supreme Court cases have strongly affirmed that notions of sovereignty that existed when the Constitution was formed have lost none of their relevance in the subsequent two centuries. [30]One of the fundamental components of that sovereignty is the right to decide for itself when or under what circumstances a sovereign will be sued, especially in its own courts. Based on the long-standing principles

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[29] *See Amicus* Brief of the United States in *Kiowa Tribe v. Manufacturing Technologies* (96– 1037) at pp. 22–25. This brief also notes that with respect to the immunity of foreign governments, "the courts did not take it upon themselves to abrogate the sovereign immunity of foreign governments in certain circumstances. That step was left to the political Branches, as the Constitution required."

[30] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Congress lacks power to abrogate state sovereign immunity from suits commenced or prosecuted in the federal courts), *Alden v. Maine*, 67 USLW 3683 (U.S. 1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. * * *" *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 67 USLW 3682 (U.S. 1999).

enunciated in *Williams v. Lee*, 358 U.S. 217 (1959) tribal courts almost always possess exclusive jurisdiction over agreements with Indian tribes.

Rather than trying to reconcile these divergent views concerning tribal sovereign immunity, the approach taken in S. 613 builds upon an apparent agreement that Indian tribes and their contracting partners are generally best served if questions of immunity are addressed, resolved, or at least disclosed when a contract is executed. As discussed above, this view is also shared by Indian tribes that have entered into increasingly complex commercial transactions by addressing immunity directly. Such arrangements are especially relevant where parties are seeking to utilize or create a secondary market for tribal obligations. To be sure, all tribal obligations may face disparagement in such secondary markets if a perception exists that tribal immunity will preclude enforcement of these agreements. Such perceptions may develop even in instances where a party contracting with a tribe was fully informed about the tribe's immunity. As Chairman Campbell indicated upon introducing S. 613: "I am concerned, however, about those who may enter into agreements with Indian tribes knowing that the tribe retains immunity but at a latter time insist that they have been treated unfairly by the tribe raising the immunity defense." [31] Under terms of S. 613, there will not be any question that a party entering into a contract that requires federal approval pursuant to Section 81, as amended, was at least informed of tribal immunity. In practice, there appears to be a consensus that this requirement will not violate any

[31] Cong. Rec. March 15, 1999, p. S.2666.

core tribal interests. As one member of the Committee explained:

> [E]arlier hearings discussed contracts in which sovereign immunity is sometimes imposed. It's probably the field, listening to all of the testimony, in which there's been the most extensive abandonment of sovereign immunity on a case by case basis by tribes themselves because at least in connection with large contracts, unless there is some kind of remedy, no outside organization is anxious to make a significant investment, but [I believe] it is still a problem with small day-to-day contracts.[32]

The Committee has reached a consensus that Section 81 should not (or perhaps was never intended to) apply to such "routine" contracts. With respect to those contracts and agreements that fall within the scope of Section 81, as amended, the overwhelming practice is to address immunity, and often to provide some form of arbitration, a full or partial waiver of immunity, or some other recourse. For example, irrevocable letters of credit are sometimes employed. While some form of waiver is often a practical necessity, S. 613 does not make such waivers a legal necessity. At a minimum, however, S. 613 directs the Secretary not to approve an agreement or contract covered by Section 81 if immunity is not, at least, disclosed.

Subsection (e). This provision requires the Secretary of Interior to promulgate regulations that identify those types of agreements or contracts that are not covered by subsection (b), for example

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[32] Hrng. 105–303, pt. 3, Hearing Before the U.S. Senate Committee on Indian Affairs, Sovereign Immunity, p. 35.

because they do not sufficiently encumber Indian lands.

Subsection (f). This section removes the statutory requirement that attorney contracts must be approved by the Secretary. It also makes clear that S. 613 is not intended to make any changes to provision of the Indian Gaming Regulatory Act of 1988, P.L. 100– 497, which require federal approval. Finally, consistent with the long-standing principle that the federal trust obligation may not beunilaterally terminated, S. 613 does not alter those tribal constitutions that require federal approvals.

Section 3

This section amends the Indian Reorganization Act to eliminate the requirement that attorney contacts must be submitted to the Secretary.

LEGISLATIVE HISTORY

S. 613 was introduced on March 15, 1999 by the Chairman of the Senate Indian Affairs Committee, Senator Ben Nighhorse Campbell, and referred to the Committee on Indian Affairs. On May 19, 1999 the Committee held a legislative hearing on the bill. At an open business meeting on June 16, 1999, Senator Campbell proposed an amendment to S. 613 in the nature of a substitute. Senator Orrin G. Hatch was joined as a co-sponsor of the proposed amendment.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on July 19, 1999, the Committee on Indian Affairs, by a voice vote, adopted the amendment in the nature of a substitute offered by Senator Campbell and ordered the bill reported to

the Senate, with the recommendation that the Senate do pass S. 613 as reported.

SECTION-BY-SECTION ANALYSIS OF S. 613 AS REPORTED BY THE COMMITTEE

Section 1. Short title

Section 1 cites the short title of the bill as the Indian Tribal Economic Development and Contract Encouragement Act of 1999.

Section 2. Contracts and agreements with Indian tribes

Section 2 replaces the provisions of Section 2103 of the Revised Statutes, 25 U.S.C. § 81.

Section 2(a) provides three definitions: "Indian lands," "Indian tribe," and "Secretary";

(b) Establishes that agreements or contracts that encumber Indian lands for a period of seven or more years are not valid unless they are approved by the Secretary of Interior or his designee;

(c) Makes subsection (b) inapplicable if an appropriate official determines that a contract or agreement is not covered by that subsection;

(d) Directs the Secretary to refuse to approve an agreement if that agreement either violates federal law or it fails to include a provision that either: provides remedies to address a breach of the agreement; provides a reference to applicable law (found in either tribal code, ordinance, or competent court ruling) that discloses the tribe's right to assert immunity; or waives immunity in some manner;

(e) Provides the Secretary for 180 days to issues regulations for identifying the types of agreements or contracts that are not covered under subsection (b);

(f) Establishes that this section is not to be construed to require Secretarial approval of contracts for legal services; or limit, amend, or repeal the authority of the National Indian Gaming Commission, or any tribal organic documents that require Secretarial approval.

Section 3. Choice of counsel

Section 3 amends the Indian Reorganization Act to strike the requirement for Secretarial review and approval of attorney contracts.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 613, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 9, 1999.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 613, the Indian Tribal Economic Development and Contract Encouragement Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Megan Carroll (for federal costs), and Marjorie Miller (for the impact on state, local, and tribal governments).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 613—Indian Tribal Economic Development and Contract Encouragement Act of 1999

Summary: Based on information from the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA), CBO estimates that implementing S. 613 would reduce discretionary costs for BIA by a total of about $2 million over the 2000–2004 period. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. S. 613 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that this mandate would impose minimal costs that would be far below the threshold established by that act ($50 million in 1996, adjusted annually for inflation). Further, the bill would reduce the costs of an existing mandate, more than offsetting any new mandate costs. S. 613 contains no new private-sector mandates as defined in UMRA.

S. 613 would amend a provision of law (25 U.S.C. 81) to remove certain restrictions on contracts between Indian tribes and other parties. This provision, known as section 81, requires DOI's approval of all contracts involving payments between non-Indians and Indians for services relative to Indian lands. Under current law, any contract that is subject to this provision and is not approvedby DOI can be declared null and void. As amended by S. 613, section 81 would only require approval of contracts that encumber Indian lands for a period of at least seven years. S. 613 would prohibit DOI from approving contracts that neither provide for remedies in the case of a breach of contract nor explicitly disclose or waive an Indian tribe's right to assert sovereign immunity as a defense in an action brought

against it. In addition, the bill would amend the Indian Reorganization Act to remove a requirement that a tribe's choice of legal counsel and the fees to be paid to such counsel be subject to DOI approval.

Estimated cost to the Federal Government: Based on information form DOI and BIA, CBO expects that S. 613 would reduce the number of contracts the department has to review each year. CBO estimates that implementing this legislation would reduce costs for BIA by between $300,000 and $400,000 in each of fiscal year 2000 through 2004. Any change in overall BIA spending would be subject to appropriation action.

Pay-as-you-go considerations: None.

Estimated impact on state, local, and tribal governments: Section 81 currently imposes a mandate on tribes to submit certain contracts for approval by the Secretary of the Interior. The bill would greatly reduce the number of contracts requiring approval, thus reducing the cost to tribes of the existing mandate. But under this bill, a tribe entering into a covered contract would have to include a specific statement regarding its sovereign immunity. This in an additional enforceable duty imposed on tribes, and so would constitute an intergovernmental mandate under UMRA. The cost of this mandate would be minimal, however. It would not affect the rights of either party under such contracts, but would only require that these rights be explicitly stated.

Estimated impact on the private sector: This bill contains no new private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Megan Carroll. Impact on State, Local, and Tribal Governments: Marjorie Miller.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 613 will have a minimal regulatory or paperwork impact.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law (existing law proposed to be omitted is enclosed in black brackets, new matter printed in italic):

25 U.S.C. 81

[No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

[First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

[Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

[Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

[Fourth. It shall state the time when and place where made, the

particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

[Fifth. It shall have a fixed limited time to run, which shall be distinctly stated. All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.]

SEC. 2103. (a) In this section:

(1) The term "Indian lands" means lands, the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term "Indian tribe" has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term "Secretary" means the Secretary of the Interior.

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract—

(1) violates Federal law; or

(2) does not include a provision that—

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that

discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

(e) Not later than 180 days after the date of enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 1999, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b).

(f) Nothing in this section shall be construed to—

(1) require the Secretary to approve a contract for legal services by an attorney;

(2) amend or repeal the authority of National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.); or

(3) alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.

* * * * * * *

25 U.S.C. 476(e)

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or

its tribal council the following rights and powers: To employ legal counsel[, the choice of counsel and fixing of fees to be subject to the approval of the Secretary]; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

APPENDIX AA

UNITED STATES DEPARTMENT
OF THE INTERIOR
Office of the Secretary
Washington, D.C. 20240

Mr. Morad Tahbaz
Mohawk Management, LLC
Monticello Raceway
Route 17 B
P.O. Box 5013
Monticello, New York 12701

Dear Mr. Tahbaz:

As you know, the Department of the Interior is in the process of reviewing the application of the St. Regis Mohawk Tribe (Tribe) for a two-part Secretarial determination that a gaming establishment on a 29.31 acre parcel of land to be acquired in trust for the benefit of the Tribe in Monticello, New York, is in the best interest of the Tribe and its members and not detrimental to the surrounding community, in accordance with Section 20(b)(1)(A) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(b)(1)(A). As part of our review of the documentation submitted with the application, we have identified provisions in several documents that raise significant questions or concerns. We request that these provisions be modified or explained, as outlined below, before we can proceed with the Secretarial determination.

Gaming Facility Development and Construction Agreement

1. Section 2.1 seems to give the Developer the right during the term of the Management Agreement "to design, engineer, develop, construct, and furnish the

Gaming Enterprise." The Management Agreement assigns some of those responsibilities ,to the Manager. Section 7.3 releases the "Developer from its obligations under this Agreement and this Agreement shall terminate upon the occurrence of all of the following condition: (a) the Commencement Date has passed; (b) the Project has been Completed; (c) the Architect has delivered to the Authority and the Tribe the certificate required by Section 2.7; and (d) the General Contractor . . . have been paid all amounts owed to them:" Please clarify the Developer's on-going role in the casino. Does the developer hive an on-going role with the project after his release under 7.3 of the Gaming Facility Development and Construction Agreement?

2. Section 2.2 establishes a Development Business Board (Board), to be comprised of four (4) members, with two (2) members to be appointed by the St. Regis Mohawk Gaming Authority (Authority) and two (2) to be appointed by Monticello Raceway Development Company (Developer). The Board is responsible for, among other things, the approval of a budget for the design and construction of the facility (sec. 2.4), the designation of a "Concept Program" (sec. 2.5(a)), the approval of a construction management agreement or construction contract (sec. 3.1) and the selection of vendors to provide furniture, trade fixtures, equipment and furnishings necessary to operate the Gaming Facility (Art. 4).

It is anticipated that the land upon which the Gaming Facility is to be located will be owned in mist by the United States, with the Tribe as the beneficial owner. The Authority is responsible for payment of one hundred percent (100%) of the Project Costs as that term is defined in sec. 1.1, and which are

estimated to be five hundred five million dollars ($505,000,000). The Gaming Facility will be the property of the Authority, and we assume the Tribe. We believe that matters such as the approval of a budget for the design and construction of the facility, the designation of a "Concept Program," the approval of a construction management agreement and the selection of vendors to provide equipment and furnishings necessary to operate the Gaming Facility are matters that should be within the sole discretion of the Authority and the Tribe. The developer's role should be limited to providing advice and assistance with regard to these matters, but it should not be able to participate in decisions that are generally reserved to the owner of a facility.

3. Payment for Improvements to Non-Casino Property: Section 2.4(a) and other provisions of the agreement provide for improvements to the non-casino property to be paid by the Authority out of the development funds. We do not believe that it is appropriate for the Authority to be responsible for improvements to the non-casino property. Accordingly, we recommend that the agreement be modified to provide that (i) no tribal/Authority funds be expended for improvements to the non-casino property and (ii) that the Business Development Board shall only consist of members selected by the Authority.

4. Section 3.4 provides for progress payments without any hold-back. The provision should provide for a hold-back of payments to the General Contractor until project completion and acceptance as completed by the Tribe.

5. Please explain what "services" the Developer is undertaking to perform under the Gaming Facility Development and Construction Agreement to earn a

5% of total Projects Costs Developer's Fee under section 5.3. Please state what the Developer's Fee is estimated to be in dollars, based on development costs of $505 million. Is the Developer entitled to any other compensation under the agreement besides the Developer's Fee?

6. Compliance with Tribal Law: As presently drafted, Section 6.2 unlawfully restricts the **governmental authority of future tribal governments. The provision needs to be modified so as not prohibit future tribal governments from exercising governmental authority. The provision should be redrafted so** as to provide that 'in the event future tribal governments adopt resolutions, ordinances, etc., contrary to the obligations of the Tribe under the agreement and/or damages the position of the Developer in a manner contrary to the agreement, such events shall be deemed a breach of the agreement" entitling Developer to seek remedies consistent with the agreement.

7. The Gaming Facility Development and Construction Agreement must contain a provision that protects the Tribe against competition in Sullivan County from the Developer, its affiliates, and its major owners (5% or more), for a reasonable period of time.

Gaming Facility Management Agreement

The Gaming Facility Management Agreement must contain a provision that protects the Tribe against competition in Sullivan County from the Manager, its affiliates, and its major owners (5% or more), for a reasonable period of **time.**

Shared Facilities Agreement

1. Section 7.2, by reference to sec. 6.9, requires that the Authority shall contribute 95% of the funds to a "Promotion Fund" which is to be utilized to pay the costs of the joint marketing and advertizing program (Marketing Program) established under sec. 7.1. The purpose of the Marketing Program is to jointly promote the Gaming Facility and the Track Facility. Pursuant to sec. 4.7 of the Amended and restated Gaming Facility Management Agreement, the Manager is responsible for advertising and promoting the Gaming Facility in accordance with a an approved plan. Given that the Gaming Facility will have its own marketing and advertizing program, we question why the Authority should be responsible for paying 95% of the costs of marketing the two facilities jointly.

2. Use of common areas: As presently drafted, the agreement merely infers that the Authority/Tribe shall be entitled to use the common areas in the manner contemplated by the agreement but falls short of actually granting or recognizing a property interest of the Authority/Tribe in the common areas. The agreement needs to be modified so as to confer the Authority/Tribe's property interest in the common areas.

3. The Shared Facilities Agreement must contain a provision that protects the Tribe against competition at the track and in Sullivan County, from the track, its affiliates, and its major owners (5 % or more), at least until termination of the agreement. The track gets exclusivity on race betting; the Tribe should get exclusivity on casino gaming (table games and electronic machines other than parimutuel wagering).

Declarations of Covenants. Conditions and Restrictions

The agreement must contain a provision that prohibits activity on the race track property (200 acres less the trust property) that competes **with** the scope of gaming at the casino. The track gets exclusivity on race betting; the Tribe should get exclusivity on casino gaming (table games and electronic machines other than parimutuel wagering).

Leasehold Mortgage

1. Representations and Warranties by Mortgagor: Section 1.2(d) provides/ that the Authority shall **warrant that "all applicable building, zoning, occupational safety and health, energy and environmental laws, ordinances and regulations affecting the mortgaged Property permit the use and occupancy thereof' as a gaming facility. This provision, however, appears inconsistent with Section 2.7 of the Development Agreement which provides in part that the "design, construction and maintenance of the Gaming Facility" shall meet all minimum standards Wider NY building codes, fire codes and safety and traffic requirements "but excluding planning, zoning, and land use** laws, ordinances, regulations, and requirements that would be imposed on the gaming facility by existing NY or federal statutes that would be applicable if the gaming Facility were located outside of the jurisdictional boundaries of the Tribe. It is inconsistent to request the Authority/Tribe to warrant compliance with building, use and occupancy ordinances and regulations which the Developer is not obligated to comply with in the construction of the facility.

Accordingly, we recommend that the inconsistency be modified in a manner that would permit the Authority/Tribe to honor/comply with the warranties at issue.

2. Impositions and Liens: Section 1.7 obligates the Authority to pay and discharge or cause to be paid or discharge all taxes, assessments, etc. imposed on mortgaged property. We are concerned that the provision may be construed in such a manner to obligate Authority to pay taxes imposed on property after Tribal acquisition of same. At the minimum, the agreement needs modification to release the Tribe from any duty/obligation to pay any taxes, assessments, levies or other charges imposed on the property on or after the date the Tribe acquires the property.

Cooperation Agreement

1. Contributions to Community Development Fund: Section II(C) provides for payments to be made by the Authority into a Community Development Fund to 'assist the village and other governmental agencies with negative impacts associated with the Casino Property provided that the Tribe is conducting Class II and Class III gaming thereon." In its present form, it is unclear as to when payments are to be made. Are the payments to be made from the time construction begins [Section II(C)(1)] or at the time the Tribe commences gaming operations? Accordingly, the section needs to be modified in a manner that clarifies the date of payment. Furthermore, in the event payments are to commence during construction of the facility, the agreement should be modified to provide for the payments to be made into escrow. Payment of the escrow funds to the Community Fund should not be made until such time the Tribe commences gaming.

Second, the agreement does not address what is to occur in the event construction is completed but the Tribe does not commence gaming operations. We request that the agreement be amended to address this possible event.

2. Building Codes: Section III(E) of the agreement raises the same concerns we identified in regard to Section 2.7 of the Development Agreement and Section 1.2(d) of the Leasehold Mortgage.

Please contact the Office of Indian Gaming Management at (202) 219-4066 if you have any questions regarding this matter.

Sincerely,

Similar Letters sent to:

Ms. Hilda Smoke, Chief
Ms. Alma Ransom, Chief
Mr. Paul Thompson, Chief
St. Regis Mohawk Tribe
412 State Route 37
Hogansburg, New York 13655

Mr. Thomas Aro
President
Alpha Hospitality Corporation
12 East 49th Street
New York, New York 10017

RESPONSE OF ST. REGIS MOHAWK TREE AND SAINT REGIS MOHAWK GAMING AUTHORITY TO DEPARTMENT OF INTERIOR LETTER OF MARCH 11, 2000, MARCH 14, 2000

Gaming Facility Development and Construction Agreement

I. Developer's On-Going Role In The Casino

Response: Other than the prescribed duties set forth in Section 2.1 of the Gaming Facility Development and Construction Agreement, all of which must be completed in order for the Gaming Facility and the Non-Casino Facility to attain the Commencement Date, the Developer has no on-going role in the Project under such Agreement. Moreover, upon the occurrence of all the events specified in Section 7.3, the Developer shall be released of its obligations under the Agreement and the Agreement shall terminate. Developer assists with the initial equipping of the Gaming Facility (exclusive of gaming equipment) during the start-up phase in order to commence operations, but there is no overlap of responsibility with the Manager under the Management Agreement.

2. Developer's Role

Response: The Authority retains all proprietary powers as owner of the Gaming Facility. The Authority, through the Development Business Board, must approve all major decisions, including design, budget, and major contracts.' In effect, under the contract as drafted, the Developer cannot make any major decision or undertake any major action concerning the development or construction of the Gaming Facility, but must obtain the consent of the Authoriry for all major decisions or actions.

Note that, "Except as otherwise expressly provided in this Agreement, in order to be effective, any action of the Development Business Board must be the result of agreement by at least three members of the Development Business-Board or designees." al. § 2.2) Thus, in any action requiring the approval of the Development Business Board, the Authority essentially has *a* veto.

The establishment of business boards representing owner and developer or manager is 'a' well-accepted method utliized by contracting parties to ensure that owner retains control, while providing the developer/ manager with sufficient authority to carry out its obligations to develop

The Development Business Board has the power to approve or disapprove the following: the form of the contract with the architect and the payments to the architect § 2.3); the development and construction budget and any material changes thereto L. § 2.4); the design for the facility L. § 2.5); the lane and specifications § 2.6); the award of the contract for the construction management agreement Monticello Raceway (except parimunel gaming, state lottery games, and slot machines if they were legalized by the state and were "incidental to the use of the Track Facility"). Shared Facilities Agreement § 4.A. The parties did not enter into a broader non-competition clause for various reasons. We note that non-competition clauses generally prohibit both parties from competing with the other, and that the Tribe and Authority did not want to agree not to compete.

Nonetheless, to meet your concern, the Manager and Catskill have agreed that neither they nor any affiliate or major owners will (1) manage, develop, or have any interest in any gaming facility in Sullivan

County, or (2) engage in any gaming at the Monticello Raceway (other than parimutuel wagering and State Lottery), for the duration of the agreements between the parties. The attached Master Amendment amends the D&C Agreement, the Management Agreement, and the Shared Facilities Agreement have been amended to reflect this understanding.

Gaming Facility Management Agreement—Non-Competition Clause

See above.

Shared Facilities Agreement ("SFA") 1. Promotion Fund

Response: Although it may appear that the Authority is to bear 95% of the costs of a joint marketing program, as explained below this is actually an operating expense to be borne by. the Gaming Facility.

As you note, under the Gaming Facility Management Agreement, Manager is to advertise and promote the Gaming Facility. The SFA does provide for the establishment of a program to jointly market the Gaming Facility and the Raceway if the parties so desire, to be paid for through the Promotion Fund, funded in an amount to be agreed upon by the parties. If the parties do not agree to such a fund, then there simply is no joint marketing program. The Authority effectively has the power not to engage in joint marketing.

The SFA does provide that the Authority will bear 95% of the costs of the joint marketing program. just as it will bear 95% of the cost of maintenance, operation and management of the Common Areas (i.e., the Easement Areas, walkways, parking areas, etc.) under section 6.9. The joint marketing program,

however, like all of the other shared operating costs under .Article 6, will be an operating expense of the Gaming Facility and therefore will be paid out of gross revenues of the Gaming Facility (rather than net). Under the Management Agreement, the Authority's share of costs under Articles 6 and 7 of the SFA will be borne by the Authority and the Manager in proportion to their share of Net Revenues.

The Authority has agreed that the Gaming Facility will bear 95% of shared costs because it expects that the Gaming Facility will reap 95% of the value of these costs. The agreement

Response Of SL Regis Mohawk Tribe And Gaming Authority

March 13, 2000

Page 6

Tribe or the Authority to any tax or acknowledges that the Tribe or the Authority may be taxed. The provisions of Section 1.7, however, are needed to deal with how taxes, assessments, or liens will be dealt with, whether or not they are illegal. You will note that this section provides that the Mortgagor (i.e., the Authority) may contest any taxes assessed, and that it is relieved of its obligation to pay any taxes assessed if it diligently contests such assessment.

Cooperation Agreement

1. Contributions to the Development Fund

Response: Section 2(C) of the Cooperation Agreement between Catskill and the Village of Monticello does specify when payments are to be made. See. paras. (1) (monthly payments commencing at start of construction), (2)(c)&(3)(c) (quarterly payments

commencing 90 days after opening of casino). The agreement is clear as to when payments are to start, and no change is necessary.

The only payments that commence upon construction (rather than the opening of the Gaming Facility), is a monthly payment of $17,000 to the Fund during construction (up to a maximum of $400,000). Section 2(C)(1). These payments, which will be paid out of the Financing, will in turn be paid from the Fund to the Village of Monticello, see section 2(D)(1)), and are intended to mitigate the impacts of the construction on the Village. These impacts were identified in a study which is part of the record in the Tribe's application under 25 CFR Part 151.

Placing these small monthly payments into an escrow account during the period of the construction, as the Department requests, will be contrary to the very purpose of the payments and the intention of the parties. It could also damage relations with the Village of Monticello, which has been a fervent supporter of the project.

2. Building Codes

Response: As stated in your letter, it appears that your concern is with a possible inconsistency between the Tribe's representations in the Leasehold Mortgage and its agreement in the Cooperation Agreement to abide by local codes. As provided in the attached Master Amendment, the Leasehold Mortgage will be amended not only with regard to your comment as to the Development and Construction Agreement, but also with regard to the language in the Cooperation Agreement as well

APPENDIX BB

Deal Signed for Casino at Old Catskills Resort

May 2, 2000 By CHARLES V. BAGLI

NEW YORK—In another round of billion-dollar poker involving a proposed casino for the Catskills, the world's largest gambling company announced Monday that it had signed an option to buy Kutsher's Country Club, the oldest resort in the Catskills, to create a 1,400-acre entertainment complex and gambling hall that would be owned by the St. Regis Mohawks tribe.

The resort would sit on Anawana Lake in Sullivan County, about five miles north of the site at Monticello Raceway that federal officials approved last month, after a four-year-long application for a $500 million casino and entertainment complex for the Mohawks.

But the leaders of the Mohawk tribe recently abandoned that plan and signed an unusual agreement with Park Place Entertainment, which owns 28 gambling operations in New Jersey, Nevada, Mississippi and overseas. The agreement grants Park Place the right to develop and manage Mohawk casinos throughout New York.

That new agreement is being viewed with increasing skepticism by political and governmental officials who helped gain support for the original plan.

The announcement Monday by Park Place appears to be another attempt to outmaneuver the tribe's original partners in Monticello, Catskill Development, and seize control of a project that the developer

estimates could generate more than $1 billion a year. Some gambling analysts doubt that Park Place truly wants a hall in Monticello that would undercut its three casinos in Atlantic City. The company said Monday that it would build a resort hotel with up to 2,000 rooms in addition to the casino. The project would rival the Foxwoods casino in Connecticut and employ 4,500 people in a county whose resort industry has been slowly dying for 30 years.

"We intend to build a destination resort on the site of Kutsher's," said Clive Cummis, general counsel for Park Place. "We'll build a hotel and casino, upgrade the golf course. This would be a giant step forward in the rebirth of Sullivan County."

Cummis said Park Place believed it would inherit the federal approval granted to the original Mohawk project and proceed quickly, but officials at the Bureau of Indian Affairs and the National Indian Gaming Commission, which oversees management contracts between casino operators and tribes, said the company would have to file a new application for Kutsher's, a process that could take two to four years.

For that reason, Sens. Charles Schumer and Daniel K. Inouye and other supporters of the tribal casino were bewildered by the tribe's sudden alliance with Park Place, just when the long-sought Monticello Raceway casino seemed assured. They had supported Catskill Development's plan to put 30 acres in trust for the tribe under a seldom-used provision of federal law. The trust would establish a sovereign Indian territory for a gambling hall and bypass New York's prohibition on casinos.

"I was surprised and not prepared for this sudden change," said Inouye, vice chairman of the Senate

Indian Affairs Committee. "I am certain that those of us who have been trying to assist the St. Regis Mohawk tribe would like to hear directly from them about what has happened, or is happening."

Local officials in Sullivan County told four Mohawk chiefs at a meeting Friday night at the Town Hall in Thompson, Sullivan County, that they would not look kindly on a casino at Kutsher's, or a delay in the county's long-awaited casino project. The chiefs said they wanted to put a casino at the raceway, according to two people who attended the meeting, but were also considering another location, which the two men presumed to be Kutsher's.

Cummis struck a deal on Friday with Mark Kutsher, the head of the family that owns the country club, under which Park Place agreed to buy 50 acres within 60 days and a five-year option to acquire the remaining 1,350 acres. Park Place, which said it would transfer the 50 acres to the Mohawks, agreed to hire the Kutsher family, as well as its employees, and to continue to use the Kutsher name in some manner.

APPENDIX CC

BEAR, STEARNS & CO. INC.
EQUITY RESEARCH

Park Place Entertainment (PPE $12 1/16)–Buy

Park Place Sees Promising Future In New York

Data

Long-Term Growth 15% million	52-Wk Range $13-$6	Avg Day Trade Vol 1.7
LT Debt to Tot Cap 63.7%	Dividend/Yield Nil	Net Debt $5.2 billion
Last ROE 4.7%	Shares Out 313 MM	EV/Fwd EBITDA 5.7x
Target Price $15-$17	Market Cap (MM) $3.8 billion	Net Debt to EV 44%
EV/EBITDA 6.4x	Book Value $12.00	

Earnings Estimates P/E

	Q1. Mar	Q2 Jun	Q3 Sep	Q4 Dec	Year	Year
1998	$0.14A	$0.15A	$0.14A	$0.05A	$0.49A	24.6x
1999	$0.16A	$0.15A	$0.19A	$0.11A	$0.61A	19.8x
2000	$0.15E	$0.16E	$0.22E	$0.14E	$0.67E	18.0x
2001					$0.76E	15.9x

EBITDA EV/

	Q1. Mar	Q2 Jun	Q3 Sep	Q4 Dec	Year	EBITDA
1998	$176 MM	$184 MM	$184 MM	$139 MM	$683 MM	8.7x
1999	$193 MM	$179 MM	$213 MM	$191 MM	$776 MM	7.6x
2000	$319 MM	$329 MM	$360 MM	$321 MM	$1,329 MM	6.4x
2001					$1,366 MM	5.7x

This past weekend, articles surfaced in the New York papers regarding Park Place Entertainment's proposed deal with the St. Regis Mohawks to develop a casino in the Catskills. While a signed deal with the tribe has not been confirmed by the company, we believe Park Place will pay $3 million for the exclusive option to develop and manage any Native American casino in the state with the Mohawk tribe. However, the timing of any casino opening is uncertain right now, given the number of unknown variables including legislative approval, and the design and financing of the facility, but we do believe this property could open before any of the new major property developments open in Atlantic City. In addition, we believe this deal could discourage competitors in Atlantic City from proceeding with future development plans. As such, we believe this is currently a win-win situation for Park Place given its nominal capital investment coupled with the potential sizeable returns that could occur. In our view, this is another example of Park Place's growth strategy of executing upon a low risk/high return project with substantial upside to the company's earnings. Given the strength of the North American gaming market, we believe that the proposed casino at the Monticello raceway in the Catskills, could generate revenues of approximately $1.0-$1.5 billion. Assuming a 30% EBITDA margin, this casino could generate $300-$450 million in EBITDA of which we estimate Park Place could yield 590-$120 million in management and development fees with the remainder going to the tribe.

WHEN WILL THIS HAPPEN?

In our view, we currently believe a fully operating casino, if built, still has many hurdles to overcome as debate in the state will likely ensue, legislative ap-

proval must occur, the National Indian Gaming Commission must approve any management contracts between the tribe and Park Place or any other non-Native American investors) and the casino must be designed, financed and built. As a result, we would not expect any operating casino until 2002. However, we believe this facility could open before any of the proposed casino projects in Atlantic City. One other option is for the operation of a temporary facility with only table games and pull-tabs, as slot machines are currently prohibited in the state. Any changes in rules and/or regulations regarding slot machines would require a change to the state constitution, which could face opposition, further delaying the project. Given the number of unresolved issues mentioned above and in more detail in our BACKGROUND section below, we still believe any operational casino is still 12-18 months away.

THE IMPACT

We believe any development of a casino in the Catskills could potentially have a moderate impact, on the Foxwoods and Mohegan Sun casinos in Connecticut, while minimal, if any impact on the Atlantic City market. We believe the primary draw of this casino would be from the New York and upstate New York areas, which, in our view, would not have a material affect on Atlantic City, but could have a more defined impact on the Connecticut casinos despite the significant size and scope of these casinos and the loyalty of their customers. However, the Mohegan Sun currently derives only 20% of its business from New York, and that market continues to grow rapidly, which should minimize the financial impact of any new casino development in the surrounding New York area. As we believe only one operating casino in

the Catskills will have a minimal impact on Atlantic City, this is particularly important to Park Place, as it currently generates approximately 30% of its EBITDA from this market. We also believe that any potential development in the Catskills could cause AC operators to reconsider any future development plans, as we believe the opening of a temporary or permanent casino in the Catskills could open prior to any of the new proposed casinos in Atlantic City and fuel additional competition for gamer visits. In addition, with the agreement with the Mohawks, we believe Park Place is well-positioned to potentially acquire the 425-room Kutsher's Country Club in Monticello, near the racetrack in order to provide a complete gaming package with full-resort amenities. Park Place would be able to leverage this property to provide guests with overnight stays and more gaming incentives.

SOME BACKGROUND

In early April, the Bureau of Indian Affairs (BIA) approved taking land into trust by the St. Regis Mohawk tribe of upstate New York for the operation of a casino adjacent to the Monticello Raceway in the Catskill Mountains of New York. We had previously believed this would not have happened, as it sets the stage for bad precedence for other Native American tribes seeking to open facilities around the country. However, this has occurred in two other instances, where the BIA has allowed non-contiguous land to be taken into trust in both Wisconsin and Washington State. Based on conversations with the BIA, the approval of these situations is extremely rare, and each case must be judged on its own merits. The Monticello situation has passed a two-step determination, as required by the Indian Gaming Regulatory Act, in

which the BIA concluded that the operation of an off-reservation casino would be beneficial to the tribe and that the casino would not be detrimental to the local community.

While the BIA has determined that the 30-acre site adjacent to the Monticello Raceway satisfied the two-step determination, we believe the state must enter into an amended gaming compact with the St. Regis tribe (the tribe already has a compact that covers a casino it operates on its reservation in upstate New York) before gaming becomes a reality in the Catskills area. At this point, it is unclear whether the governor has the authority to amend the compact himself or whether it is subject to legislative approval. New York State's constitution currently prohibits casinos other than those on Indian reservations, making it possible that "off-reservation" Native American casinos might violate the constitution. In an effort to clarify the process, Governor Pataki proposed legislation last month that would have required legislative approval for the governor to enter into a compact covering casinos on off-reservation land taken into trust. Based on our research, this has not yet become a law, and it is possible that this deal can still be approved without legislative approval. On the other hand, this would likely spur legal debate as representatives from other parts of the state will likely seek to develop casinos, while anti-gaming advocates are likely to seek to nullify the proposal altogether. As a result, the status of the proposal is still unclear and the ultimate outcome of gaming in the Catskills is not yet a done deal.

Meanwhile, assuming either legislative or executive approval of an amended compact, which is likely to take three to six months to resolve in our view, it

would still take a long time before a casino could become operational. The BIA must review the casino proposal again following the signing of an amended compact to ensure that it is beneficial to the tribe. As a result, the amended contract must be fair to the tribe, especially as it relates to revenue-sharing provisions between the tribe, management company, and the state. According to the BIA, it has 45 days following the submission of the amended compact to determine if it remains beneficial to the tribe. In addition, the National Indian Gaming Commission must approve of any management contracts between the tribe and non-Native Americans. Finally, the tribe must design, finance and construct the casino.

VALUATION

In our view, Park Place Entertainment continues to remain undervalued despite consistent earnings growth. Park Place should benefit primarily from its geographically diverse asset portfolio with operations in all major traditional casino markets, and additional properties in several of the emerging markets. The company's geographic diversity should lower the overall risk of future earnings volatility, in our opinion. With the Caesars acquisition, Park Place acquired a great brand with prime real estate locations, and substantial upside to those properties operations. It would be hard, if not impossible, to duplicate Park Place Entertainment's collection of gaming assets and brands. Furthermore, Park Place should benefit from leveraging its significant brand name recognition and marketing potential with its strong portfolio of brands including Caesars, Bally's, and Hilton. This is particularly meaningful as new development opportunities in gaming have become increasingly limited. With a relatively solid balance sheet, antici-

pated strong cash flow, and access to low cost capital, we expect Park Place to continually evaluate attractive acquisition opportunities and/or business combination transactions within the gaming industry. We would view the company's decision to enter an agreement with the Mohawk tribe as an ideal example of this type of business opportunity with a low risk situation and the potential for high returns.

In estimating the value of Park Place Entertainment, we used a five-year discounted cash flow method to arrive at our $15-$17 asset valuation. This implies roughly a 7.0x-7.5x forward EBITDA multiple on our 2001 EBITDA estimate of $1.36 billion. Based on the company's portfolio of assets, strong management team, and anticipated growth of free cash flow, we believe the current returns to investors warrant a Buy rating. Park Place shares are currently trading at 6.4x, and 5.9x our 2000 and 2001 EBITDA estimates of $1.33 billion and $1.36 billion, respectively. On an EPS basis, PPE shares are trading at 17.8x and 15.9x our pro forma EPS estimates for 2000 and 2001 of $0.67 and $0.76 per share, respectively.

PPE-Within the past three years, Bear, Stearns & Co. Inc. or one of its affiliates was the manager (co-manager) of a public offering of securities of this company and/or has performed, or is performing, other banking services, including acting as financial advisor, for which it has received a fee.

Bear, Stearns & Co. and others associated with it may make markets in, have long or short positions in and effect transactions in securities of companies mentioned in this note.

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No. 08-984

Supreme Court, U.S.
FILED
MAR 4 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., JOSEPH BERSTEIN, DENNIS VACCO, and PAUL DEBARY,

Petitioners,

v.

HARRAH'S OPERATING COMPANY, INC. and PARK PLACE ENTERTAINMENT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where an Indian tribe is induced to enter into contracts relating to the management of a proposed casino that will operate on trust land, are those contracts valid and enforceable, even if not approved by the NIGC, simply because the land on which the casinos are intended to operate is not yet "Indian land"?

2. Are so-called "precursory obligations" contained in casino management contracts with Indian tribes enforceable if the NIGC has not approved the contracts?

3. Is the Land Purchase Agreement at issue in this case a collateral agreement relating to the management of an Indian casino?

PARTIES TO THE PROCEEDINGS

Respondents agree with the statement contained in the Petition for a Writ of Certiorari that the real parties in interest are Petitioner Catskill Litigation Trust and Respondent Harrah's Operating Company, Inc. Respondents also agree that the Trust is currently represented by trustee Dennis C. Vacco and Joseph E. Bernstein.

The Respondents do not agree that the Trust represents either the interests of 13,000 members of the St. Regis Mohawk Tribe or the Tribe as a juridical entity. The purported assignment of any claims held by any members of the Tribe or the St. Regis Tribe itself is currently the subject of separate litigation pending in the Northern District of New York, *Dennis C. Vacco and Joseph E. Bernstein, et al. v. Harrah's Operating Company, Inc. and Clive Cummis*, Case No. 07-CV-0663 (TSM/DEP).

CORPORATE DISCLOSURE STATEMENT

Respondent Park Place Entertainment Corporation ("Park Place"), changed its name to Caesers Entertainment Inc. and, on or about June 28, 2005, Caesars Entertainment, Inc. was merged into Harrah's Operating Company, Inc. Harrah's Entertainment, Inc. is the parent company of Respondent Harrah's Operating Company, Inc. There are no other parent and no publicly held company owning 10% or more of the stock of the Respondents.

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Catskill Dev. LLC v. Park Place Ent. Corp., 217 F. Supp. 2d 423 (S.D.N.Y. 2002) ..... *passim*

Catskill Dev. LLC v. Park Place Ent. Corp., 286 F. Supp. 2d 309 (S.D.N.Y. 2003) 6

Catskill Dev. LLC v. Park Place Ent. Corp., 345 F. Supp. 360 (S.D.N.Y. 2004) 6, 11

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Guidiville Band of Pomo Indians v. NGV Gaming, Ltd., 531 F.3d 767 (9th Cir. 2008) ..... *passim*

Native American Servs., Inc. v. Givens, 213 F.3d 642, 2000 WL 328137 (9th Cir. March 23, 2000) 13

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STATEMENT OF THE CASE

The Mohawk Tribe entered into a series of contracts with the Catskill Group[1] for (1) the sale of certain land in Monticello, New York for use by the Tribe as an Indian gaming facility, (2) the construction of the facility and (3) the management of the facility by the Catskill Group. Because an Indian gaming facility could only legally operate in New York on "Indian land", the parties asked the Bureau of Indian Affairs ("BIA") to take the proposed site (the "Monticello Site") into trust for the benefit of the Tribe.

In April 2000, after years of frustration with the Catskill Group, the Mohawk Tribe agreed to enter into an agreement with Park Place giving Park Place the exclusive right to develop casinos in the State of New York with certain exceptions not applicable here. Park Place proposed an alternative site for a Mohawk gaming facility also in the Catskill region (the "Kutsher's Site"). The Catskill Group claimed that Park Place had tortiously interfered with its agreement with the Mohawk Tribe. Park Place argued that there could be no tortious interference because the contracts were void because they had not yet been approved by the National Indian Gaming Commission ("NIGC") under the Indian Gaming Regulatory Act, 25 U.S.C. §2710(d)(7) ("IGRA").

---

1. All the terms and abbreviations used herein are the same as those used by the Second Circuit Court of Appeals in its decision in *Catskill Development L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115 (2d Circuit 2008) which appears at pages 1a-40a of the Appendix to the Petition for Certiorari herein ("Petitioner's App.").

The intent of IGRA and the accompanying regulations is clear: No management contract and no collateral agreement that relates to the management of the gaming operation is valid unless it is approved by the NIGC. The legislative history of IGRA confirms that the purpose of this statutory scheme is to shield tribes from organized crime and other corrupting influences and to insure that Indian tribes are the primary beneficiaries of gaming operations. 25 U.S.C. § 2702 quoted in *Catskill Dev. LLC v. Park Place Ent. Corp.*, 547 F.3d 115, 119 (2008) (hereinafter "Catskill") (Petitioner's App. at 3a). That legislative purpose would be defeated if casino management companies could impose binding contractual commitments on tribes merely by signing the management contract before the land on which the casino would sit was taken into trust.

The Petitioners ask this Court to accept certiorari in this case because of the filing of a petition by Respondent in case No. 08-665 seeking review of *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.* 531 F.3d 767 (9th Cir. 2008) ("Guidiville")(Petitioners' App. at 197a). In *Guidiville*, the Ninth Circuit held that the subject contracts (which were not casino management contracts) did not require approval by the Secretary of Interior pursuant to 25 U.S.C. § 81 because the contracts related to land that was not yet "Indian land." It was not Indian land because it had not yet been taken into trust by the United States on behalf of the Indian tribe. The petition in *Guidiville* was based on the disagreement between the Second and Ninth Circuits with regard to the application of the Dictionary Act, 1 U.S.C. §§ 1-8 as it applied to the definition of "Indian land" and the relevant statutes in those two

cases. However, this Court denied certiorari in *Guidiville* on January 26, 2009, evidencing this Court's lack of interest in addressing that issue at this time.

The Dictionary Act issue is even less relevant to this petition since, as is more fully set forth below, the Second Circuit found that it did not have to address the question of whether the land at issue here was Indian land, because there is no requirement in IGRA, as opposed to § 81, that contracts subject to NIGC review must relate to "Indian land." *Catskill*, 547 F.3d at125-26 (Petitioners' App. at 15a-19a).

Moreover, the *Guidiville* decision does not support Petitioner's position. In *Guidiville*, the Ninth Circuit specifically noted that the casino management contracts at issue in that case were *not* valid because they had not yet been approved by the NIGC, even though the casino was to be placed on land that was not yet "Indian land." *Guidiville*, 531 F.3d at 126 (Petitioners' App. at 206a and n. 6).[2]

Finally, this is not an appropriate case to decide the "Indian land" issue because there are separate and

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2. Specifically, the *Guidiville* court stated that "the Tribe has itself recognized that its management contract with Harrah's (which would have imposed on it an indemnification obligation covering NGV's claims against Harrah's) was void under § 2705(a)(4) due to the Tribe's failure to have obtained approval of that contract by the chairman of the Gaming Commission." Section 2705(a)(4) is the provision in IGRA that specifically gives the NIGC authority to approve management contracts for Indian gaming casinos. *See* Petitioners' App. at 432a.

independent grounds for the granting of summary judgment in favor of Respondents. The District Court found that, even if Petitioners could establish that they had a valid contract or that Respondents had engaged in wrongful conduct sufficient to state a claim for tortious interference with prospective business relations, Respondents would still be entitled to summary judgment because Petitioners could not establish, under New York law, that "but for" Respondents' actions, Petitioners would have consummated their contractual arrangement and built a casino at the Monticello site. The District Court found that there were numerous economic and regulatory hurdles that Petitioners still faced in bringing the casino to fruition and therefore they could not establish causation. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 217 F. Supp. 2d 423, 440 (S.D.N.Y. 2002) ("Catskill II")(Petitioner's App.79a, 114a-115a). Events have proven the District Court correct because, even to this day, there are no Indian gaming facilities in the Catskill region.

PROCEDURAL HISTORY

This action was commenced by the Catskill Group in the United States District Court for the Southern District of New York on November 13, 2000 alleging claims against Park Place for tortious interference with contract, tortious interference with business relations, unfair competition and violations of New York's Donnelly Act. In its first decision, the District Court dismissed the tortious interference with contract claim because the Court found that none of the contracts that Park Place had allegedly interfered with had been approved by the NIGC as required by IGRA. The Court also dismissed the unfair competition and Donnelly Act

claims; Petitioners did not appeal those dismissals. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 144 F. Supp. 2d 215 (S.D.N.Y. 2001) ("Catskill I")[3] (Petitioner's App. at 143a).

The Catskill Group moved for reconsideration of *Catskill I* with regard to one of the contracts, the Land Purchase Agreement ("LPA"), arguing that that contract did not need NIGC approval. The Court granted reconsideration and reinstated the claim as to the LPA only. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 154 F. Supp. 2d 696 (S.D.N.Y. 2001)(Petitioner's App. at 125a). Park Place then moved the District Court to reconsider that decision and, while that motion was pending, moved for summary judgment on all the remaining claims. The District Court granted summary judgment dismissing the entire case, finding, after approximately forty (40) depositions, and thousands of pages of discovery, that the Catskill Group had failed to show that Park Place had engaged in any wrongful conduct. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 217 F. Supp. 2d 423 (S.D.N.Y. 2002) ("Catskill II")(Petitioner's App. at 79a). The Court also reinstated its decision in *Catskill I* holding that the LPA, like the other contracts entered into between the Catskill Group and the Mohawk Tribe, required NIGC approval.

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3. Respondents adopt the abbreviations used by the Second Circuit to identify the District Court's opinions. Petitioners have used abbreviations different from those used by the Second Circuit, causing unnecessary confusion.

While the appeal was pending from *Catskill II*, the Catskill Group moved pursuant to Federal Rule of Civil Procedure 60(b) to vacate the judgment based upon the discovery of six audio tapes which had not been produced to the Catskill Group in discovery. Finding that the failure to produce the tapes was a result of a mistake or misunderstanding, the District Court nonetheless held that the Catskill Group was entitled to further limited discovery based upon the evidence contained in the tapes. *Catskill Dev. LLC v. Park Place Ent. Corp.*, 286 F. Supp. 2d 309 (S.D.N.Y. 2003) ("Catskill IV"). After granting such additional discovery, the District Court reaffirmed its grant of summary judgment in *Catskill Dev. LLC v. Park Place Ent. Corp.*, 345 F. Supp. 2d 360 (S.D.N.Y. 2004) ("Catskill V") (omitted from Petitioners' papers and attached hereto as Respondent's App. at 1 A). Subsequently, while the second appeal was pending, the Catskill Group disclosed that complete diversity of jurisdiction was lacking because of the citizenship of one of its parties and, after remand and further proceedings below, that jurisdictional defect was cured. *See Debary v. Harrah's Operating Co. Inc.*, 465 F. Supp. 2d 250 (S.D.N.Y. 2006) ("Catskill VI")(Petitioners' App. at 41a). On October 21, 2008, the Second Circuit Court of Appeals affirmed the dismissal of the claim for tortious interference with contract and affirmed the grant of summary judgment on the claim for tortious interference with prospective business relations. *Catskill*, 547 F.3d at 136-37. (Petitioners' App. at 1a).

STATEMENT OF FACTS

In 1995, the Catskill Group acquired the 230-acre Monticello site for $10 million and, after unsuccessful negotiations with other tribes, eventually entered into agreements with the St. Regis Mohawk Tribe. The Catskill Group executed three (3) primary agreements with the Tribe: (1) a Management Agreement ("MA"), that would govern the actual management of the casino and provide the Catskill Group with a portion of the profits therefrom (R 508)[4]; (2) the Development and Construction Agreement ("DCA") that would govern the actual development and construction of the casino (R 596); and (3) the LPA by which the Tribe would acquire a 29-acre parcel out of the 230-acre site. All three agreements, by their very terms, were subject to federal approval (R 436).

In order to bring the project to fruition, the Catskill Group needed to overcome a number of regulatory hurdles. First, in order to operate a Native American casino that was not on an Indian reservation (which the Monticello site was not), the Catskill Group needed to convince the Bureau of Indian Affairs ("BIA") to take the land into trust on behalf of the Mohawk Tribe. *See* 25 U.S.C. § 2719(b)(1)(a). Once the BIA approved taking the land into trust, it was then necessary for the Governor to approve that transfer. On April 6, 2000, the BIA agreed to take the land in trust (R 921-38), but final approval was never given because the Governor had not yet consented to such transfer ((R 1567 at ¶ 8);

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4. Record citations appearing at "R ___" are references to the Record before the Court of Appeals.

217 F. Supp. 2d at 443-44), and the BIA had not made a final determination that the price to be paid by the Tribe did not exceed fair market value. *See* 25 C.F.R. Part 151; 217 F. Supp. 2d at 444 (R 874).

Moreover, no Class III casino can operate without a compact between the Tribe and the State of New York. 217 F. Supp. 2d at 444-45. Then-Governor Pataki had made it clear in numerous public announcements that no compact would be entered into with the Mohawks unless the Mohawks had settled their longstanding land claims dispute with the State. (R 1567 at ¶ 8).

In addition, any management contract and any related agreements that affected the management of the casino would have to be approved by the NIGC. Although the Catskill Group submitted their application to the NIGC in August 1996 (Appellants' Br. in the Court of Appeals at 16), it never received approval, and was formally rejected five (5) times. (*See* R 715-22; 865-66; 870-72; 873-74; 875-76). The NIGC questioned the suitability of the Catskill Group as manager of a casino in light of numerous regulatory problems encountered by one of the Group's principal investors with regard to its operation of casinos in the State of Mississippi. (*See* R 1225-95; 45-53). In addition, three principals of the Catskill Group were under criminal investigation, two have since been convicted, and one is a fugitive from justice. (R 1356-1432; 1631-36; 1433-36). Moreover, the Catskill Group demanded from the Mohawks a compensation scheme which was in excess of the established NIGC Guidelines (*See* R 717 at ¶ 1; 1653-66; 299-300; 301; 385) and had induced the Mohawks to pay $10 million for only 29 acres of land that the Catskill

Group has since admitted is worth only $150,000. (R 230; 248-49; 343; 356-57; 874 at ¶ 7).

The Catskill Group's problems before the NIGC were so numerous that, at a meeting held in February, 2000, NIGC staff advised the Mohawk Chiefs that their application for the Monticello casino was in serious trouble and that, in the NIGC's view, the Tribe was likely to encounter the same problems with the Catskill Group that it had encountered with the operation of the Mohawk's then-existing casino at the Akwesasne Reservation. (*See* R 740-51; 357; 359; 372; 243-44; 330; 363-65).

The Akwesasne Casino had opened in April 1999 under the management of President R.C. – The St. Regis Management Company ("President"), whose principal is Ivan Kaufman. The casino lost money from the day it opened, and the Mohawks were very concerned that the casino would fail, causing the loss of hundreds of jobs for tribal members. (*See* R 211-12; 262-64; 326). After an investigation was undertaken, the Tribe learned of numerous financial irregularities arising from President's management of the Casino and ultimately terminated President's management of the Casino in April, 2000. (*See* R 1670-75; 1676-77; 1678-90; 1691-92; 1693; 1713-18; 1720-21; 1722-23).

While the Catskill Group's application was bogged down with the NIGC (to the great displeasure and frustration of the Mohawks), the relationship between the Catskill Group and the Mohawks seriously deteriorated. The principals of the Catskill Group had cultivated a relationship with a faction of the Mohawk

Tribe, the so-called "Constitutionals" which was out of power, and the Three Chiefs' Government, which was then in power (R 67; 98-99), believed that they were being treated disrespectfully and dismissively by the Catskill Group's principals. (R 76; 258-60; 292; 224-25; 226-27; 288; 367; 752-53) (referring to Three Chiefs as the "three amigos.")). The relationship had gotten so bad that Robert Berman, one of the Catskill Group's principals, was ordered by the Chiefs to stay off the Reservation. (R 177; 132-33; 61; 95; 380).

Park Place had become interested in the possibility of developing a Catskill casino in the Fall of 1999 and approached Kaufman, whose firm was still operating at the Akwesasne Casino, to make an introduction to the Tribe.[5] Kaufman proposed, and Park Place agreed, that Park Place would consider some role in salvaging the Akwesasne Casino as a means of convincing the Mohawks to undertake a relationship with Park Place for the development of a casino in the Catskills. (R 1549-50). The principals of President and Park Place

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5. Petitioners' statements that Respondents "became prolific interlopers in Indian Country," that they had "developed a strategy to become involved in ventures that had already reached the regulatory approval stage" and that they developed a "legal defense strategy to insulate [themselves] from liability for breaking up contractual relationships with competitors of the tribes" (Petition at 7) are without any citation to the record and have no support in the record. There is also no evidence in the record and no citation to the record to support Petitioners' assertion (Petition at 8, 11-12) that either Park Place or its former executive, Arthur Goldberg, entered into the agreement with the Mohawk Tribe for the purpose of stopping the Monticello project, rather than for the purpose of developing Park Place's own project with the Tribe.

negotiated for several months over the terms of a possible takeover of the management of the Akwesasne Casino, but those negotiations were not successful and ultimately ended when the Tribe terminated its relationship with President. (R 1548; 1551; 1693; 1720-21; 1722-23).[6]

Soon after terminating its relationship with President, the Tribe offered Park Place a proposal whereby the Tribe would give Park Place an exclusive right (with certain exceptions) to develop casinos in the State of New York in return for a $3 million loan to be paid to the Tribe. The Tribe needed these funds to pay past due expenses to the New York State Police and the New York State Racing and Wagering Board for oversight of the Akwesasne Casino. An agreement was entered into on April 14, 2000 between the Mohawks and Park Place and, after this agreement was signed, the Catskill Group terminated all further discussions with the Mohawk Tribe. (R 725-26). Park Place offered terms to the Tribe for the operation of a casino at the Kutsher's site that was, in every respect, far superior to the offer the Catskill Group had made (R 350).[7]

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6. Petitioners' contentions that Park Place conspired with Kaufman or his company to "squeeze" the Tribe to Park Place's advantage was found to be without factual merit by the District Court. *Catskill V*, 345 F. Supp. at 365-68 (Respondent's App. at 11a-17a). That finding was affirmed by the Court of Appeals. *Catskill* at 547 F.3d at 136.

7. For example, the Three Chiefs concluded that there was "no comparison" between what Park Place offered the Tribe and what the Catskill Group was willing to give. (R 350, 357). Park Place offered what the Chiefs described as a "mega resort" (R 328, 342); the Catskill Group offered a land-locked island in the middle of the Catskill Group's racetrack property. (R 342, 349-50). The

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Within five (5) days of the April 14, 2000 agreement, the Catskill Group's NIGC application was rejected for a fifth time. (R 715-22).

ARGUMENT

I. Petitioners "Indian Lands" Argument was Properly Rejected by the Court of Appeals and is Inconsistent with Long Standing Case Law.

The District Court held, and the Court of Appeals agreed, that Park Place could not have tortiously interfered with any contract between the Mohawk Tribe and the Catskill Group because none of the contracts entered into were valid unless and until they had been approved by the NIGC. *Catskill*, at 547 F.3d at 124-25. That holding is consistent with longstanding case law.

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Catskill Group proposed to sell the Tribe 29 acres for $10 million, despite the fact that it paid only $10 million for the *entire* 230-acre parcel. (R 230, 248-49); (343, 356-57). Park Place, in contrast, offered to *give* the Tribe 66 acres. (R 343). The Catskill Group also demanded 35% of the earnings of the casino, five percent greater than that allowed by NIGC guidelines. (R 521, 356). Further, the Catskill Group demanded a 5% "developer's fee." (R 612, 329-30, 246). In contrast, Park Place sought only 30% of the earnings of the casino and did not demand any developer's fee. (R 356). The Catskill Group also cut the Tribe out of all the ancillary developments that the Catskill Group planned to build on the land surrounding the casino, including retail amenities, entertainment facilities and a hotel. (R91-92, 292-93; 294-95, 343, 349-50, 357). Park Place's deal included a hotel and all retail, sports and entertainment amenities from which the Tribe would receive 70% of the profits. (R349-50, 357). Finally, the Catskill Group intended to charge the Tribe for 90% of the cost for all the access roads in the entire project. (R66).

A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 788-89 (9th Cir. 1986); *Scutti Enterprises, LLC v. Park Place Entertainment Corp.*, 322 F.3d 211, 215-16 (2d Cir. 2003); *Native American Servs., Inc. v. Givens*, 213 F.3d 642, 2000 WL 328137, at *1 (9th Cir. March 23, 2000) (gaming management contract not approved by NIGC is void); see also *The Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 889-90 (10th Cir. 1989) (bingo management contract not approved pursuant to 25 U.S.C. § 81 is void).

In an attempt to evade this longstanding case law, Petitioners argued, *for the first time on appeal*[8], that, even though casino management contracts must be ratified by the NIGC, the contracts with the Mohawk Tribe did not have to be ratified because the land on which the casino was to be built was *not yet* Indian land. The Second Circuit properly held that this argument carried no weight because, by the clear terms of IGRA, NIGC approval of Indian management contracts is not

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8. This argument was never made below to the District Court. Thus Petitioners' statement on page 19 of their Petition that this argument had been repeatedly ignored by the District Court, "*without explanation*" is wrong and disingenuous. Indeed, the only reference to this issue below was one sentence in the Catskill Group's Motion for Reconsideration of the initial order dismissing the tortious interference with contract claim, referencing that it was allegedly the Bureau of Indian Affairs's position that none of the agreements required approval because the land was owned by Catskill, and therefore the contracts did not involve "Indian lands." See May 30, 2001 Catskill Br. in Support of its Motion for Reconsideration, at 17. This argument was not made in the Catskill Group's opposition to the Park Place motion for summary judgment.

dependent upon whether the casino was on Indian land *Catskill* at 547 F.3d at 125-26. Moreover, the Second Circuit properly held that reading an Indian land requirement into the statute and requiring that the land be in Indian hands before NIGC review would apply, would eviscerate Congress's intent to promote and protect the best interest of Indian tribes. *Id.* The fact that the land on which the casino is intended to operate is not yet in trust does not eliminate the need for the NIGC oversight that Congress believed was necessary to protect Indian tribes from improvident gaming contracts. *Id.* at 126.

This case presents the perfect example of the Second Circuit's reasoning. Under Petitioners' argument, once the Mohawk Tribe had signed a contract with the Catskill Group, it would be forever wedded to the Catskill Group, even if other suitors presented more favorable proposals to the Indian tribe (which Park Place did) and even if the NIGC found the Catskill Group contracts not to be in the Tribe's best interest (which it did) and even if the NIGC refused to approve those contracts (which it did). In rejecting Petitioners' argument, the Second Circuit held that the Mohawk Tribe was free to solicit new offers and to enter into new agreements unless and until a contract with any particular management group was approved by the NIGC.[9]

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9. Ironically, the Catskill Group itself took advantage of this principle. Ultimately, the Mohawk Tribe became dissatisfied with its arrangement with Respondent Harrah's because the Tribe could not obtain BIA approval to take the Kutsher's site

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Moreover, Petitioners' argument simply makes no sense. Under Petitioners' reading of IGRA, a management contract with an Indian tribe would be valid so long as the BIA did not approve the land into trust. Once the BIA approved the land transfer into trust, however, the contracts would then become *invalid* because the land would then be Indian land, and the contracts would require NIGC approval. The contracts would then remain invalid unless and until the NIGC subsequently approved the contracts.

The more logical and common sense approach is to simply hold that management contracts with Indian tribes must, at all times, be approved by the NIGC and that is exactly the way the NIGC interpreted its obligations in this case. As both the District Court and the Court of Appeals found, the NIGC rejected the Catskill Group's contracts five times, even though the land had not yet been (and never was) taken into trust. *Catskill* at 547 F.3d at 125-26 (Petitioners' App. 14a-18a), *Catskill II*, 217 F. Supp. 2d at 442 (Petitioners' App. 114a-115a).

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into trust. The Mohawk Tribe, believing that the original Monticello site would be approved by the BIA, went back to the Catskill Group and entered into new contracts, walking away from its agreement with Harrah's. In the ultimate irony, the successor to the Catskill Group ultimately walked away from its agreement with the Mohawk Tribe when neither it nor the Mohawk Tribe could obtain BIA approval for the Monticello Site.

II. Petitioners' "Precursory Obligation" Theory Does Not Merit Review Because it is Flatly Inconsistent with Established Case Law and the Purpose of IGRA.

Petitioners also argue that, even if the "operative terms" of the management contracts needed to be approved by the NIGC before they became effective, certain provisions of those contracts, the "precursory obligations", should be held valid insofar as they require the tribe to act in good faith to seek agency approval. As the Second Circuit held, this argument was flatly rejected in *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 788-89 (9th Cir. 1986). Further, the Second Circuit, in its extensive analysis, properly rejected Petitioners' reliance on other cases which clearly do not support Petitioners' precursory obligation theory.

Moreover, like their Indian lands argument, Petitioners' precursory obligation argument is flatly inconsistent with the purpose of IGRA. If the Tribe were required to honor its so-called precursory obligations without NIGC approval, then it would be prevented from soliciting or receiving offers from other management firms even if, as happened here, the NIGC advised the Tribe that the contracts were not in the Tribe's best interest. The clear intent of IGRA was to protect Indian tribes from undue influence and corruption by insuring that no management contract and no portion of any management contract would become effective unless or until it was approved by NIGC. Requiring the Mohawk Tribe to stick with the Catskill Group's contract and to take all steps necessary

to obtain approval of that contract, even if the Tribe changed its mind or concluded that the contract was not in its best interest, is clearly inconsistent with that Congressional purpose.

III. Petitioners' "Collateral Agreements" Argument is Without Merit and is Fact-Specific to this Case.

Petitioners argue that the LPA is merely a "collateral agreement," not a "management agreement," and therefore does not need to be approved by the NIGC. The law with regard to whether a collateral agreement is subject to NIGC review is not in dispute. As the Court of Appeals properly held and as Petitioners concede (Petition at 34), the NIGC's approval is required, not only for management contracts, but also for collateral agreements that provide "for the management of all or part of a gaming operation." *Catskill*, 547 F.3d at 130-31. (Petitioners' App. at 25a-26a) (quoting 25 C.F.R. § 502.15).

The issue here is a factual one which does not merit this Court's review: i.e., does the LPA relate to the management of the proposed Monticello casino? As the Court of Appeals found, the NIGC in this case specifically treated the LPA as a collateral agreement relating to management because the NIGC questioned whether the LPA contained a hidden management fee and was therefore related to the management of an Indian gaming operation. *Id.* at 131 (Petitioners' App. at 28a). In addition, the Court of Appeals noted that the parties contemplated that the NIGC would have to approve the LPA; they submitted the LPA to the NIGC for approval; and never argued to the NIGC that the LPA did not need NIGC approval. *Id.* Finally, the Court of Appeals

noted that the LPA, by its terms, was contingent upon BIA approval of the transfer of land into trust for the Tribe. *Id.* Thus, without NIGC or BIA approval, the LPA was not an enforceable contract and Petitioners' tortious interference with contract claim must fail as to the LPA, as it fails with respect to the MA and the DCA. *Id.* 131(Petitioners' App. at 28a-29a)[10].

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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10. Petitioners do not dispute that the MA, being a management agreement was subject to NIGC approval. Further, as the Second Circuit expressly noted, *Catskill*, 547 F.3d at 130(Petitioners' App. at 28a), the NIGC held that the MA and the DCA together were in fact management contracts subject to NIGC approval.

APPENDIX

APPENDIX — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED NOVEMBER 15, 2004

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 00 CIV.8660(DM).

CATSKILL DEVELOPMENT, L.L.C., Mohawk Management, L.L.C., and Monticello Raceway Development Company, L.L.C.,

Plaintiffs,

v.

PARK PLACE ENTERTAINMENT CORP.,

Defendant.

Nov. 15, 2004.

MEMORANDUM DECISION AND ORDER REVISITING THE COURT'S PREVIOUS FINDING CONCERNING EVIDENCE OF "WRONGFUL MEANS;" REINSTATING THE JUDGMENT AND DIRECTING THE CLERK OF THE COURT TO ENTER JUDGMENT FOR DEFENDANT

MCMAHON, District Judge.

On October 7, 2003, this Court issued a Memorandum Decision and Order granting plaintiffs' motion to vacate this Court's decision granting summary judgment to defendant on plaintiffs' claim of intentional interference with prospective business relations. This court had jurisdiction to enter the order because the United States Court of Appeals for the Second Circuit-where an appeal from this court's final judgment was pending-relinquished jurisdiction so that I could reopen the record and reconsider my previous finding that plaintiffs had failed to adduce evidence of "wrongful means," necessary predicate to establishing their claim of intentional interference. In the October 7 decision and order, I directed the parties to conduct limited discovery on a very tight time line and to present briefs limited to the subject of "wrongful means" so that I could decide the issue and get the case back to the Second Circuit.

An intervening event extended the schedule. On November 21, 2003, the Second Circuit certified to the New York Court of Appeals, in case entitled *Carvel Corporation v. Noonan*, 350 F.3d 6 (2d Cir.2003), the question of whether a franchisee had a valid claim for interference with prospective economic relations. The New York Court of Appeals accepted the certified question in order to clarify certain language in its controlling case, *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980) and *NBT Bancorp. Inc. v. Fleet/*

Norstar Financial Group, Inc., 87 N.Y.2d 614, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996), concerning what a plaintiff must show "where there has been no breach of an existing contract, but only interference with prospective contract rights. . ." *NBT, supra*, 87 N.Y.2d at 621, 641 N.Y.S.2d 581, 664 N.E.2d 492. Because the answer to that question could have proved dispositive of the question I had reclaimed this case to resolve-whether plaintiffs had raised a genuine issue of material fact concerning defendant's alleged use of "wrongful means" to induce the St. Regis Mohawk Tribe to enter into an exclusive casino development agreement with Park Place—I put everything on hold pending the outcome of *Carvel*.

On October 14, 2004, the New York Court of Appeals handed down its decision in *Carvel v. Noonan*, 3 N.Y.3d 182, 818 N.E.2d 1100 (2004). I have read that decision and the briefs of the parties commenting thereon. To my great dismay, I fear I agree with plaintiffs that Judge Robert S. Smith's opinion does not set forth the sort of "bright line" test for what constitutes "wrongful means" that I was hoping for. I must, therefore, wrestle with the issue I started out to address upon vacatur of the original judgment. Judge Smith's opinion does, however, offer me some guidance on the point, which I gratefully accept.[1]

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1. To avoid any confusion between the two appellate courts, all references to a "Court of Appeals" are to the New York Court of Appeals. The United States Court of Appeals for the Second Circuit is referred to as the "Second Circuit."

Appendix

I. Carvel and the Concept of "Wrongful Means" in Connection with the Tort of Interference with Prospective Economic Relations

The second cause of action in the complaint in this action (the only claim with which we are concerned) alleges that Park Place intentionally interfered with plaintiffs' non-contractual but prospective business advantage with the St. Regis Mohawk Tribe in connection with the casino it proposed to develop at the Monticello Raceway in Sullivan County, New York.[2]

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2. I decline to revisit my conclusion that the unapproved Land Purchase Agreement (LPA) and Development and Construction Agreement (DCA) between the Tribe and plaintiffs were not enforceable contracts. Plaintiffs invite me to alter this conclusion based on an opinion letter issued by the National Indian Gaming Commission on January 9, 2004, which held that not all "collateral agreements" between tribes and outsiders related to gaming on reservations had to be submitted for NIGC review and approval before they were valid. Plaintiffs' argument is not persuasive for three reasons. First, the NIGC opinion letter post-dates the events in issue by many years, was issued by an entirely different administration in Washington, and relates to an entirely different set of contracts between the St. Regis Mohawk and parties who are not involved in this lawsuit. Second, it is indisputably clear from the record in this case that back in the late 1990s-the relevant time period for our purposes—the NIGC *did* insist on approving collateral agreements. Plaintiffs' own behavior supports no other conclusion. Plaintiffs submitted the Land Purchase Agreement to the NIGC for its review and engaged in a lively debate with the NIGC over whether the LPA was part and parcel of the Management Agreement. The record shows that NIGC personnel

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Appendix

Under New York law, a third party's interference with a prospective business relationship that has not

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viewed the LPA as an integral part of the Management Agreement because the proposed payment for the land was viewed by NIGC personnel as a disguised management fee. Plaintiffs disputed the NIGC staff interpretation. Third, the recent opinion letter changes nothing because, had the NIGC ultimately reached the conclusion that the vastly inflated land price was really a disguised management fee, then the LPA would have been subject to approval even under the terms of that opinion letter. ("If the. . . . agreement existed at the time of the approval of the management contract, and if it was reviewed, *it would have been subject to approval or disapproval as a management contract if it. . . . provided for management of the gaming operation in some manner.*") The issue of whether the LPA was part and parcel of the Management Agreement—hotly disputed between plaintiffs and the NIGC staff—had not yet been decided by the Agency when the Tribe abrogated its relationship with plaintiffs, *Catskill Development L.L.C. v. Park Place Entertainment Corp.*, 217 F.Supp.2d 423, 433 (S.D.N.Y.2002) (*Catskill III*), and there could be absolutely no guarantee that the NIGC would have come down in plaintiffs' favor on this point. In fact, the record reveals that plaintiffs had made little headway in convincing the staff that the land purchase price was not a disguised management fee. Plaintiffs' contention that the 2004 NIGC letter should alter my analysis of the need for approval of the LPA is, therefore, without merit.As for the DCA, as I noted in *Catskill III*, 217 F.Supp.2d at 429 n. 2, the NIGC actually made a determination that the DCA was part and parcel of the Management Agreement, resolving the issue that was left unresolved with respect to the LPA, and rejecting plaintiffs' position. This means that, even under the reasoning of the 2004 NIGC opinion, it was subject to NIGC approval. In fact, the NIGC opinion letter vindicates this Court's reasoning insofar as the DCA is concerned.

yet been reduced to contract is actionable only in limited circumstances. To prevail on such a claim, a plaintiff must show that the defendant's conduct was "culpable." That can mean one of two things:

> (1) The defendant acted for the *sole* purpose of inflicting intentional harm on the plaintiffs. Actions taken to promote the economic interest of the defendant are not taken for the sole purpose of harming the plaintiff; or
>
> (2) The defendant effected the interference by "wrongful means."

For many years, it appeared that "wrongful means" was limited to the commission of acts that were either criminal or independently tortious. However, in *Guard-Life*, 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445, the New York Court of Appeals referred approvingly to Section 768 of the Restatement [Second] of Torts, the comments to which described "wrongful means" to include not only criminal acts, but "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure, ... [but not] persuasion alone although it is knowingly directed at interference with the contract." Predictably, a question arose: since a party was privileged to attempt to procure business for itself as long as it did not interfere with a bona fide contract, what could possibly be meant by "some degrees of economic pressure?" Economic pressure was all but guaranteed in any situation where a competitor tried to step between his

competitor and a third party with whom both wished to deal. What would make such economic pressure wrongful?

My hope was that the New York Court of Appeals would answer this question definitively in *Carvel.* It did not.

Carvel was a suit brought by several Carvel franchisees against their franchisor, alleging that Carvel's distribution of its products through supermarkets that competed with the plaintiff-franchisees was both tortious and a violation of their franchise rights. Among the claims asserted was one for "interference with prospective economic relations" between the plaintiff franchisees and their customers. The gravamen of the claim was that Carvel induced persons who would otherwise have bought their ice cream from Carvel to purchase Carvel products in supermarkets. The New York Court of Appeals concluded that this claim was foreclosed by New York law.

The *Carvel* court did reject the plaintiff's assertion that the economic pressure exerted in that case—special offers to the supermarkets, including price concessions, that allowed them to undersell the independent franchisees and thus made the supermarkets a more attractive venue for customers—constituted "wrongful means." In so holding, the Court of Appeals did endorse the proposition that the economic pressure had to be "extreme and unfair," 3 N.Y.3d at 191, 785 N.Y.S.2d at

363, 818 N.E.2d at __, 2004 WL 2320368 at *4, or "egregious wrongdoing, 3 N.Y.3d at 188, 785 N.Y.S.2d at 361, 818 N.E.2d at __, 2004 WL 2320368 at *2." However, the Court of Appeals did not set limits on what kind of conduct might someday be deemed extreme and unfair or egregious. In particular, the Court refused to hold that the phrase "some degree of economic pressure," which appears in the Restatement [Second] of Torts, meant that conduct would not be deemed extreme and unfair or egregious unless it violates antitrust laws or other well-established principles of tort. It avoided those issues, stating, "[W]e do not decide today . . . whether there can ever be other instances of conduct which, though not a crime or tort in itself, . . . could be the basis for a claim of tortious interference with economic relations. That is a question we leave for another day, because no such egregious conduct was shown here." 3 N.Y.3d at 190, 785 N.Y.S.2d at 362, 818 N.E.2d at __, 2004 WL 2320368 at *3.

The Court of Appeals rejected the argument that Carvel's inducement to supermarkets constituted "wrongful economic pressure" for two reasons, but neither of them sheds any light on what might constitute "wrongful economic pressure" in the case before me, because they are based on facts not germane to our case.

First, in *Carvel*, the alleged economic pressure was directed at the competitor of the plaintiff, not at a third party with whom both the plaintiff and plaintiff's competitor were trying to do business. *Carvel*, 3 N.Y.3d

at 188, 785 N.Y.S.2d at 361, 818 N.E.2d at __, 2004 WL 2320368 at *2. The Court of Appeals ruled, "[T]he economic pressure that must be shown is not, as the franchisees assume, pressure on the franchisees, but on the franchisees' customers . . ." *Id.* 3 N.Y.3d at 191, 785 N.Y.S.2d at 363, 818 N.E.2d at __, 2004 WL 2320368 at *4. In this case, the alleged economic pressure *was* directed at the third party "customer"-the Tribe-which had been working on a casino project with plaintiffs but transferred its allegiance to defendant.

Second, in *Carvel* the plaintiff and defendant were franchisor and franchisee, and because of the special nature of that contractual relationship, the Court of Appeals concluded that it was neither wrongful nor unfair to relegate plaintiffs to the rights specified in their franchise agreement. Here, no analogous contractual relationship exists between the Tribe and anyone—that is precisely why plaintiffs are relegated to an interference with prospective commercial relations claim.

Thus, *Carvel*, while interesting and informative, does not definitively resolve the question before me.

II. "Wrongful Means" The $3 Million Payment

No evidence in the record suggests that Park Place committed any criminal act to induce the Tribe to break off its relationship with plaintiffs, and it cannot be disputed that Park Place did not act solely to harm plaintiffs, but was instead promoting its own economic

self-interest. But Park Place gave the Tribe a desperately-needed $3 million cash infusion to induce it to walk away from its unconsummated but long-in-the-making relationship with plaintiffs and enter into an exclusive Catskill casino development arrangement with defendant. In *Catskill III*, I concluded that plaintiffs had not raised any genuine issue of material fact concerning whether that payment constituted "wrongful means." I vacated the original judgment in favor of defendant so I could reconsider that question after plaintiffs took additional discovery.

Plaintiffs have, predictably, gone beyond that rather narrow issue and suggest that the newly-discovered evidence raises a genuine issue of fact concerning other possible "wrongful means." Before I turn to those contentions, let me revisit the issue of the $3 million payment.

The underlying facts concerning the $3 million payment have not changed since *Catskill III* was handed down. The Tribe was in financial difficulty in early 2000. It owed the State of New York $3 million arising out of the operation of its Akwesane casino on the Canadian border. Akwesane had been a poor performer for years, and there is no evidence in the record before me that Park Place was responsible for that fact. On April 7, 2000, the State explicitly demanded that the $3 million be paid. The Tribe had to come up with the money right away. The evidence shows that Tribal leaders did not view plaintiffs as a viable source of funds. Instead, they approached Park Place to ask

for a loan of $3 million. Park Place agreed to give the loan, but only on the condition that the Tribe abrogate it relationship with plaintiffs and grant it the exclusive right to partner the Tribe in developing a casino in the Sullivan County.

Well prior to *Carvel*, I concluded that this sequence of events did not constitute the sort of "wrongful economic pressure" that would satisfy plaintiff's burden of proving "wrongful means" in connection with the alleged tort of interference with prospective business relations. Nothing in *Carvel* causes me to conclude that Park Place's conditioning its payment on the exclusive constitutes conduct so "egregious" or "extreme and unfair" as to rise to the level of "wrongful economic pressure." It remains undisputed that the Tribe came to Park Place for the money, not vice versa. Park Place is not a bank that makes loans to applicants. It is a business enterprise, a publicly-held corporation; it cannot make payments willy-nilly to third parties without getting something in return.

Plaintiffs, however, have more or less abandoned this "wrongful means" argument. They now rely on their alternative argument that "wrongful means" analysis is not necessary, because when Park Place gave the loan in exchange for the exclusive it committed an independent tort—namely, knowing participation in a breach of fiduciary duty committed by Ivan Kaufman, the Chief Executive Officer of a third party corporation, President RC. President managed the Mohawk's Akwesane casino. In a February 16, 2000 conversation

that was tape recorded, Kaufman said he was "squeezing" the Tribe in Akwesane and slowing down payrolls. I ruled (and I adhere to my prior ruling) that the fact that Park Place's general counsel, Clyde Cummis, said, "Yeah," and "Yep," in response to (or during) Kaufman's statements did not, in and of itself, support any inference that Park Place had knowingly participated in any wrongful conduct on Kaufman's part. I allowed plaintiffs to take additional discovery to see if they could turn up any hard evidence of Park Place's complicity in Kaufman's "squeezing" of the Tribe's payroll from Akwesane. Absent evidence (not speculation) about Park Place's knowing participation with Kaufman in a plot to "squeeze" the Tribe's payroll and create some economic difficulty, I intended tc adhere to my original ruling.

No such evidence has been submitted to this Court.

First, I want to make it clear that I am not concerned with whether there was actually a payroll slowdown. The taped conversation at the very least creates a disputed issue of fact on that point. However, to go forward on the "knowing participation in a breach of fiduciary duty" theory, there has to be evidence of two things: (1) Park Place knew about the payroll squeeze (and the tape creates at least an issue of fact as to that, too), and (2) Park Place knowingly participated in bringing the payroll squeeze about. Otherwise, as far as this court is concerned, Park Place did not "knowingly *participate*" in Kaufman's alleged breach of fiduciary duty (and I will assume arguendo that slowing down the payroll, if that

in fact happened, was a breach of Kaufman's fiduciary duty to the Tribe). I decline to reverse myself on two points that plaintiffs keep rearguing—that Cummis's non-commital comments, without more, are evidence that Park Place *participated in* (as opposed to *knew about*) the payroll squeeze; and that a reasonable jury would interpret his words as "advice or encouragement to act" that can qualify as "knowing participation. On the latter point, I note something that is self-evident from the tape of the February 16 conversation-the payroll squeeze had already happened—so any statement by Cummis could not reasonably be interpreted as encouraging Kaufman to initiate a payroll squeeze. If the tape is to be believed, Kaufman's payroll squeeze began sometime before Cummis allegedly offered him "moral support" by saying "Yeah" on February 16!

Plaintiffs have not adduced any evidence that Park Place consulted with Kaufman before Kaufman initiated the payroll squeeze. They have adduced no evidence that Park Place induced President to begin the payroll squeeze or took any action in connection to bring it about. So they have not adduced any evidence that Park Place knowingly induced Kaufman to breach his fiduciary duty.

Plaintiffs argue that Park Place aided Kaufman's breach of fiduciary duty by promising Kaufman that Park Place would buy out President's interest in the non-performing Akwesane casino and grant it an interest in any Catskills casino Park Place might develop.

According to the evidence, Park Place made this offer on January 20, 2000. But there is no evidence that Park Place was aware on January 20 that Kaufman was engaged in, or anticipated engaging in, any payroll squeeze. Thus, the making of this offer could not possibly constitute "knowing participation" in Kaufman's alleged breach of fiduciary duty.[3]

So plaintiffs assert that, by not withdrawing this offer after Cummis allegedly learned of Kaufman's payroll squeeze on February 16, Park Place gave Kaufman "sufficient comfort to risk angering the Tribe" by breaching his fiduciary duty. With all respect to plaintiffs, this is a bootstrap that stretches the holding in *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843 (2d Cir.1987), beyond the bounds of reason.

In *S & K*, one Johnson was an employee of S & K. Like all employees, he had a fiduciary duty to his employer. Nike had a contractual relationship with S & K, which apparently it could terminate at will. *Id.* at 845. Johnson went to Nike behind his employer's back and offered to come work for Nike and play the

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3. Plaintiffs allege that what Park Place hoped to get in return was an introduction to the Tribe so it could try to negotiate a deal to develop a casino in the Catskills with the St. Regis Mohawk. (Plaintiffs' Supplemental Brief on the Issue of Wrongful Means, dated December 1, 2003, at 13.) They do not explain how making such an introduction would have violated any fiduciary duty that Kaufman owed to the Tribe by virtue of President-RC's Management Agreement for Akwesane. I cannot see that it would.

same role S & K was then playing pursuant to the Nike/S & K contract. Johnson induced Nike to terminate its relationship with S & K without disclosing that Nike was about to hire Johnson. The Second Circuit had little difficulty affirming a jury's conclusion that Nike had aided and abetted Johnson's breach of his duty to his employer by terminating its contract with S & K.

Here, however, there was no agreement between Park Place and the Tribe that Park Place abrogated so it could do a deal with Kaufman. Kaufman may have owed the Tribe a fiduciary duty analogous to the one Johnson owed S & K, but in January, February and March of 2000, Park Place's only duty was to its shareholders.[4] To say that Park Place was required to withdraw its offer to President-RC when it learned of Kaufman's breach of fiduciary duty is to create a duty between Park Place and the Tribe where the law imposes none. Of course plaintiffs do argue that they insist that a reasonable juror could conclude that Park Place engaged in "knowing participation" by exploiting the Tribe's economic position to procure the Catskill casino exclusive with knowledge of the payroll squeeze-but nothing in *S & K* or any other New York case suggests that a competitor who is not interfering with an

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4. In *Catskill IV*, I rejected Park Place's argument that a claim for tortious interference with fiduciary duty would lie only if President-RC had a fiduciary duty to plaintiffs (not to the Tribe, a third party). (See opinion dated October 7, 2003, at n. 5) Now that I examine plaintiffs' argument in its fulsomeness against the facts of *S & K*, I am inclined to think that conclusion was erroneous. I leave the issue for the Second Circuit.

enforceable contract cannot take advantage of the "customer's" known economic distress.

Moreover, plaintiffs have also adduced no evidence that Park Place received anything of value *as a result of the payroll squeeze.* Even if plaintiffs' strained reading of cases like *S & K,* 816 F.2d 843, and *Diduck v. Kaszycki & Sons Contractors, Inc.,* 774 F.Supp. 802 (S.D.N.Y.1991), *aff'd in part and rev'd in part,* 974 F.2d 270 (2d Cir.1992), were tenable, Park Place would have had to share in the benefits *from the breach of fiduciary duty* in order to "knowingly participate" in Kaufman's breach of fiduciary duty. *S & K,* 816 F.2d at 847-48 (emphasis added). Park Place's participation in the breach, as alleged by plaintiffs, lay in its making the $3 million loan in exchange for the exclusive development right-not in taking money from President that would otherwise have been used to meet the payroll at Akwesane! (Or, more accurately, taking advantage of the float created by the delay in meeting the payroll, since plaintiffs do not suggest that the employees were not eventually paid).

In any event, Park Place's allegedly wrongful act happened because the Tribe needed a lot of money to pay the State of New York-not to meet payroll at the casino. The Tribe had fallen behind in payments to the State because the casino was in dire financial straits. And the evidence demonstrates, without dispute, that the Akwesane casino was in dire financial straits because it was a poor performer and had been for years! There is simply no evidence that the alleged payroll squeeze

caused the financial problem that led the Tribe to default in making payments to the State.

The only alleged breach of fiduciary duty here is Kaufman's slowing down of the payroll. Although I vacated the original judgment and gave them every opportunity to uncover *evidence* that would link the payroll situation at Akwesane to the Tribe's need for a source of funds to make a $3 million payment to the State of New York, plaintiffs have not identified any evidence tending to show that the payroll squeeze occasioned the non-payment of the $3 million, which in turn occasioned the State's demand for payment, which in turn occasioned the Tribe's immediate need for a loan. Plaintiffs really want this court to hold that, because Kaufman told Cummis that he was squeezing the Tribe's payroll, Park Place was somehow barred from accepting the Tribe's offer of an exclusive in exchange for $3 million. That is not the law.

Plaintiffs have had ample opportunity to try to weave all these strands into a coherent story that would tar Park Place with some knowing participation (whether by orchestrating or receiving the benefits from) Kaufman's alleged payroll squeeze. They have generated a lot of smoke. They have not succeeded in raising a genuine issue of material fact on the issue of either "wrongful means" or "knowing participation in a breach of fiduciary duty." I leave intact my rulings on those issues as set forth in *Catskill III*.

III. "Wrongful Means:" The Impact of *Scutti*

The only other point that needs to be addressed before this case returns to the Second Circuit is plaintiffs' argument that the Second Circuit's decision in *Scutti Enterprises, LLC v. Park Place Entertainment Corp.*, 322 F.3d 211 (2d Cir.2003)—a case decided after *Catskill III*—indicates that this court should have reached a different result in *Catskill III*. It does not.

In *Scutti*, the Second Circuit reversed Chief Judge Telesca's grant of a motion to dismiss for failure to state a claim of tortious interference with prospective business relationship (Fed.R.Civ.P. 12(b)(6)) and remanded the case so that discovery could be conducted into whether a limitation (the VTL limitation) in a contract between Park Place and the Mohawks concerning the Akwesane casino "had a legitimate business purpose or was related to any viable business interest that Park Place had in the Akwesane casino." *Scutti, supra*, 322 F.3d at 217. The Second Circuit acknowledged that it "appears" that the VTL limitation had a legitimate business rationale, but said, "It is not beyond doubt that Scutti could demonstrate that Park Place's loan offer, which induced the Mohawk's [sic] agreement to the limitation, was economic pressure unrelated to that business." *Id.* The panel made it clear that it was not expressing any opinion as to the validity of Scutti's arguments, and indicated that a summary judgment motion or trial, rather than a pre-answer motion to dismiss, would be the proper vehicle for resolving that question. *Id.*

Unlike Chief Judge Telesca in *Scutti,* this court in *Catskill III* was not deciding a pre-answer motion to dismiss, but a summary judgment motion on a developed record. The record has been further developed in connection with my recall of the case in response to plaintiffs' Fed.R.Civ.P. 60(b) motion. Plaintiffs' problem is that the fully developed record does not bear out their claims. About this, *Scutti* says nothing.

CONCLUSION

The Court having recalled this case from the United States Court of Appeals for the Second Circuit, and the parties having had an opportunity for discovery and briefing concerning the issue of "wrongful means," I adhere to my previous conclusion that defendants have not raised any genuine issue of material fact on the question of "wrongful means"—or, for that matter, on the question of the commission of any independent tort by Park Place. Therefore, I adhere to my decision granting summary judgment to defendants and dismissing the complaint in its entirety.[5]

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5. Two more years having passed, and no casino having arisen in the Catskills-although I have read in the press that plaintiffs or their successors in interest appear to be making more headway toward that goal in partnership with a different tribe than Park Place is making with the St. Regis Mohawk—I am more convinced than ever that Park Place was entitled to summary judgment on the ground that plaintiffs' proposed venture with the Tribe was too speculative to support an award of damages (the so-called "but for causation" argument).

I direct the Clerk of the Court to enter an appropriate order and the parties to restore this case to the calendar in the United States Court of Appeals for the Second Circuit immediately.

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IN THE

Supreme Court of the United States

CATSKILL LITIGATION TRUST, CATSKILL DEVELOPMENT, L.L.C., MOHAWK MANAGEMENT, L.L.C., MONTICELLO RACEWAY DEVELOPMENT COMPANY, L.L.C., JOSEPH BERNSTEIN, DENNIS VACCO, AND PAUL DEBARY,
Petitioners,

v.

HARRAH'S OPERATING COMPANY, INC., AND PARK PLACE ENTERTAINMENT CORPORATION
Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

TRANSCRIPTION ERRORS

We apologize for the following transcription errors:

On line 9 of page 14 of the Petition, the sentence should read "BIA did [not] seek to approve or request an amendment to the LPA, the contract under which the Tribe would acquire the 29-acre Project site."

On Appendix page 275a, the BIA's Findings of Fact, the second and third lines of the last paragraph

omitted certain figures in the transcription, relating to the land price under the LPA and the appraisal of the land. This should read as follows: "The Land purchase agreement establishes a purchase price of [$10,000,000]. The Monticello Property was appraised at [$95,760,000] as of July 1, 1999, by Appraisal Group International..." The appraisal was based on the land having full zoning rights for a class III casino.

PARTIES TO THE PROCEEDINGS

Respondent disputes that the enrolled members of the St. Regis Mohawk Tribe are parties to this proceeding. Respondent's claim is that the status of the tribal members as beneficial owners depends on the ultimate validity of a "purported assignment" (of a St. Regis Mohawk Tribal Court judgment against Respondent). This is not correct. The tribal members have been issued 50% of the units of the Trust under an order of the Tribal Court, which Respondent did not appeal, and cannot be undone by subsequent events.

The history of the judgment and Respondent's improper influence of Interior Department officials by ghost-writing a response to a federal judge, relating to the recognition of the judgment by the United States, may be found at www.catskilltrust.com: Vacco, Dennis C. *Investigative Report*, May 23, 2007. The ghost-written letter was subsequently vacated by the court.

EFFECT OF THE DECISION IN *CARCIERI V. SALAZAR*

Initially, we note that the St. Regis Mohawk Tribe has been recognized and under federal jurisdiction for over 200 years, such that the proposed transfer of land into trust in the instant case by the Catskill Group to the Tribe would not have been adversely af-

fected by the decision in *Carcieri v. Salazar*, 172 L. Ed. 2d 791 (No. 07-526, Feb. 24, 2009).

We urge the Court to adopt the same approach in interpreting the definition of "Indian lands" under §2703(4)(B) ("is held") as it did in *Carcieri* in interpreting the term "now" for purposes of §479. The term "is held" is equally unambiguous as the term "now", and calls for a present tense interpretation.[1]

BASIS FOR THE WRIT

With denial of the *Guidiville* petition in January 2009, the conflict between the cases has been cast in stone. The Ninth Circuit's decision is the right one– there is no federal jurisdiction over agreements relating to future trust lands. Not under §81, and not under IGRA.[2]

Simply stated, there is no basis for federal preemption of an otherwise valid state contract when there is no federal interest to protect. There has never been any question that the contracts treated as void below were in full compliance with federal law

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[1] Respondent claims Petitioners raised the Indian lands issue for the first time on appeal and in only one sentence in a motion for reconsideration in the District Court. This is simply not true. Petitioners' response to Respondent's motion to dismiss covered this subject *extensively*, as did Petitioners' motion for reconsideration, and its reply, as far back as 2001. In addition, Petitioner's response to Respondent's summary judgment motion incorporated all of the prior arguments in footnote 1. These documents are available for review.

[2] The Ninth Circuit's reference to the position of the tribe in that case that its contract was void under IGRA was simply a recitation of a fact statement by the tribe, not law, and did not even rise to the level of dicta. The tribe would have been expected to take this position in the litigation, and this point was simply not briefed or decided in *Guidiville*.

and required by their terms that the parties obtain all federal approvals necessary to implement the activities in which the federal government had an interest. By using pre-emption as a shield from its responsibilities under state law, respondent has actually defeated the federal interest in the contracts by withdrawing them from the federal review process. This has resulted in a miscarriage of justice by simultaneously undermining the federal Indian gaming regulatory scheme and needlessly involving the federal courts in the derogation of state contract and tort law.

Guidiville holds Indian lands to be a prerequisite to jurisdiction of the Interior Department under §81. The same should hold true under IGRA.[3] As set forth in the Petition, the authority of the Secretary under §81 was transferred to the Chairman under §2711(h), and approval of agreements relating to trust lands under §81 and IGRA are rooted in the same trust responsibility to tribes with respect to "Indian lands".

Catskill will create much confusion about the status of agreements relating to transfers of land into trust, as well as to what constitutes a management contract. The validity of tribal agreements is certainly of key importance under IGRA, which Congress enacted in a desire to promulgate *clear stan-*

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[3] *See, Indian Gaming Regulatory Act Amendments of 2006 Report*, June 6, 2006 (S. 2078), *109 S. Rpt. 261:* "... [T]here are instances when the NIGC must make a determination, to meet its regulatory responsibilities, whether a given parcel of land is Indian land *such that the agency has jurisdiction over the gaming activity on it*. The Committee does not intend to preclude the NIGC from determining whether lands are Indian lands *for the purposes of determining its jurisdiction*." (Emphasis supplied.)

dards and regulations for gaming on Indian lands.[4] Clarity is required at this juncture, and the Court can help provide it, reducing future litigation in Indian country that the dichotomy between *Guidiville* and *Catskill* will certainly engender.

There is a second basis for granting the Petition – "*an important question of federal law that has not been, but should be, settled by this Court...*" Rules of the Supreme Court, Rule 10(c). Catskill raises a number of important questions of federal law—whether NIGC has jurisdiction over proposed management contracts before land is held in trust, whether IGRA preempts contracts subject to state law where no Indian lands are involved, whether tribes are precluded from entering into precursory agreements to seek approval of management contracts, and whether *alleged excess fees* may, contrary to § 502.15, convert a collateral agreement with no management functions into one anyway, subjecting viturally all conceivable contracts related to a management contract to NIGC approval. This burden on the NIGC was never contemplated by

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[4] A significant purpose of IGRA was to address deficiencies in §81: "Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts... " §2701(2). "Existing federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands... " §2701(3). Senate Rep. 99-493 confirms the Chairman derives his authority from the Secretary: "... Actually, however, *this section merely delegates to the entire Commission the power already possessed by the Secretary of the Interior under existing law (25 U.S.C. 81) to approve management contracts...* Accordingly, *H.R. 1920 effectively shifts control over management contracts from the Secretary to the Commission...* " Senate Rep. 99-493, Sept. 24, 1986, at 30 (Emphasis supplied.)

Congress, and the NIGC is ill equipped to commence valuing all agreements related to a management contract subject to approval. It runs counter to the legislative regime and intent of Congress, and also to tribal self determination in second-guessing the business judgment of tribes. Indeed, the purpose of NIGC approval is administrative—to make sure all statutory requirements have been complied with, and not to serve as a "big brother" to tribes.

Catskill also introduces a new variable—*federal preemption* of agreements with Indian tribes governed by state or tribal laws, where no Indian lands exist, by virtue of the voiding provisions of Reg. §533.7, promulgated by the NIGC under authority of the voiding power under §81. IGRA has no independent statutory voiding provision (except under §2711(f) for previously approved management contracts).[5]

Any collateral agreement governed by state law, that has a value element flowing from a tribe, is now subject to classification as a management contract if the amount involved may be argued to exceed the value of the asset or service passing to the tribe, based on the notion that it is 'excessive' and, hence, a 'disguised management fee', notwithstanding that there is no management function. All *collateral agreements may theoretically require valuation because they may become management contracts if price exceeds value, by any amount.* This will become unmanageable. Who will determine value, and how,

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[5] §2711(f): "Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated."

is open to question. *Catskill* thus adds uncertainty to the status of agreements with Indian tribes nationwide. By subjecting land sale contracts to approval by the NIGC (and thus Reg. §533.7), it also creates a statutory role for the NIGC in the acquisition of land in trust for gaming purposes, which is not authorized by statute as a function of the NIGC. §2711(g) (Management contract shall not transfer interest in real property).

Respondent's proposition that all collateral agreements even indirectly related to a proposed casino are to be subject to approval if they provide for excess compensation vastly expands the NIGC's role and jurisdiction, far beyond agency practice and statutory authority.

RESPONSE TO BRIEF IN OPPOSITION

Respondent ignores Petitioner's analysis that the NIGC has no authority or jurisdiction over proposed management agreements absent existing Indian lands.[6] Respondent restates, without authority, the conclusory determination of the Second Circuit that Indian lands are not required for IGRA's class III management contract approval provisions, simply because the words 'Indian lands' are not found in §2710(d)(9). We stand by our original analysis on this point.

We further point out that when Congress transferred the authority of the Secretary to the Chairman under §2711(h) in 1988, §81 was limited to *service agreements* that were *relative to Indian lands*. The

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[6] *See, e.g., Lac Courte Oreilles Band v. United States*, 367 F.3d 650 (7th Cir. 2004)(Before land is taken into trust, it is within the jurisdiction of a state and is not yet subject to federal regulation under IGRA.)

amendment to §81 in 2000 made clear, in §81(f)(2), that the revised statute was not to affect the previous transfer of authority from the Secretary to the Chairman.[7] Hence, any argument that a particular section or subsection of IGRA does not refer to "Indian lands" does not take into account the origin and purpose of a comprehensive statutory scheme designed to deal with service agreements relating to Indian lands. §2701(1)-(3).

Respondent claims that the intent of IGRA is to shield tribes from any commitment that "relates to" the management of a gaming operation. The statutory language requires that the agreement "provides for" management of a "gaming operation", not merely *relate* to it. Reg. §502.15 (definition of a "management contract"); Reg. §502.10 (definition of a "gaming operation" as a *presently* operating business). The LPA has no management provisions, and, in fact, would terminate prior to the management contract becoming effective. Closing of the land transfer would necessarily predate the effective date of the management contract.[8] Respondent's position would invalidate tri-

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[7] "Construction – Nothing in this section shall be construed to ... (2) amend or repeal the authority of the [NIGC] under the [IGRA]." §81(f)(2).

[8] The BIA did not require approval of the LPA, as there were no "Indian lands". The NIGC did not require approval of the LPA as there was no management function and payment for the land did not come from gaming operations as the LPA would be consummated when the land went into trust. The District Court correctly determined in Catskill I that no statute exists with respect to approval of a land-to-trust "contract", as opposed to the transfer itself. Appendix, at 179a. Indeed, no purchase agreement whatsoever is even required for this purpose. *See*, 25 C.F.R. § 151.9 (request to take land into trust need not be in any special form, but must set forth the identity of the parties, a de-

bal agreements to purchase fee simple lands before any federal trust responsibility arises.

In fact, so long as a management contract is *not operative and has been submitted for approval*, it is not technically a "management contract" under IGRA. Under §2710(d)(9), a tribe *may enter into a management contract with approval of the Chairman*. The tribe and manager must execute the agreement and submit it to the NIGC. Reg. §533.2(b). But the executed agreement cannot be a "management contract" before it is entered into, as the tribe may not enter into one. That can only happen, according to the statute, after approval. What we have, then, is an inoperative management contract that is intended to *spring to life upon approval*, meaning that the parties must have agreed to be bound under the agreement when final approval is obtained, and a binding contract thus exists under state law that must be countenanced by federal law. Otherwise, upon approval, either side may simply "walk" and the approval would be for naught. This is an additional agreement—to be bound by a final approval, that Respondent also interfered with in April 2000.[9]

As to Respondent's argument that Congress enacted IGRA to protect tribes from making pre-approval commitments, logic dictates that Congress did not mean to bar tribes from agreeing to seek approval from the NIGC for proposed management contracts. While precursory commitments are binding, they are

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scription of the land to be acquired, and information indicating compliance with the statutory requirements for the transfer).

[9] *See, Thorstenson v. Norton*, 440 F.3d 1059 (8th Cir. 2006) (Nothing should hinder an Indian's right to enter into a binding agreement that remains subject to federal approval)

not binding as to the underlying contract, but only as to seeking the approval. Congress could not have meant to countenance that tribes be able to enter into transactions with developers, managers and land owners, and then renege, on a whim, prior to a full review by the NIGC. This is particularly true in the era of self determination, where Congress left to a tribe's business judgment the decision to enter into any collateral agreement that does not provide for actual gaming management functions, at whatever price it deems proper.

Respondent claims that the District Court ruled that Petitioner could not prove that Respondent's actions were the proximate cause of a failure to consummate the project. Respondent is misapplying the law. This point was raised in relation to Count II. In a tortious interference with *contract* action, in contrast to interference with business relations, if there is a binding contract, the "but for" test is not applicable, as a contract already exists. It is the breach of the contract itself that is actionable, not the failure to consummate a future business relationship.[10]

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[10] Whether or not the project would have been consummated more properly goes to the question of damages. In this regard, because Respondent's wrongdoing prevented the project from going forward, under the 'prevention doctrine', Respondent should not be permitted to profit from its own wrong. *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264-265, 90 L. Ed. 652, 66 S. Ct. 574 (1945) ("It is elementary that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.") Respondent complains that the record is devoid of reference to the recurring involvement of Park Place Entertainment Corporation, and Harrah's Operating Company, Inc., intentionally derailing tribal gaming projects of competitors. A simple Lexis-Nexis search will reveal numerous cases and news articles regarding their past conduct (not including unreported cases).

One of Respondent claims is that the BIA did not determine the price of the land was reasonable. *In fact, the BIA (or NIGC) never determined the price to be unreasonable.* The Court of Appeals made this factual determination without any record of valuation below, based simply on allegations made by Respondent on appeal. No valuation was made at the District Court level, or by the BIA or NIGC, at any time. The April 19, 2000, final NIGC review letter set forth all of the NIGC's issues. These last documents did not determine that the $10 million purchase price for the land was an obstacle or remained an issue at that point of time for the NIGC. The BIA was going to certify the land value, as it described in the Findings of Fact (Appendix, at 275a-276a), and the NIGC was content to let the BIA perform this function.

Respondent attempts to smear the Catskill Group by alleging that *two principals of the Catskill Group* were convicted, and one is a fugitive. These persons were not principals of the Catskill Group. They were principals of a public entity that was one of four partners in the group. They were indicted *two years after* the interference by Respondent, with respect to tax and other matters having nothing to do with the Catskill Group or the Mohawk project, and with respect to which there was no public information in April 2000, when Respondent stole the Tribe. When their personal problems surfaced *in 2002*, the Catskill group took control of their public company and defeased the interests of these persons with the cooperation of the U.S. Attorney and New York Racing & Wagering Board. The public company's gaming licenses were never at risk.

CONCLUSION

In closing, we note that Respondent has no standing to claim the benefits under federal voiding statutes, enacted solely for the benefit and protection of Indians. *Schmit v. International Finance Management Co.*, 980 F. 2d 498 (8th Cir. 1992)(§81); *Texaco v. Pennzoil*, 729 S.W. 2d 768 (Tex. App.-Houston [1st Dist.] 1987) (voiding provision meant to protect shareholders, cannot be invoked by interferer).

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